

MALAYSIA
IN THE COURT OF APPEAL OF MALAYSIA
CRIMINAL APPEAL NO. Q-05(M)-17-01/2023

BETWEEN

ABDUL RAHIM BIN WAHAP

...APPELLANT

AND

PUBLIC PROSECUTOR

...RESPONDENT

**[In the matter of Criminal Trial No.MYY-45B-2/7-2018
In the High Court of Sabah and Sarawak at Miri]**

BETWEEN

PUBLIC PROSECUTOR

...COMPLAINANT

AND

ABDUL RAHIM BIN WAHAP

...ACCUSED

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Dated this 26 SEP 2025



FIRDAUS BIN MORSHIDI of
 Messrs. Firdaus and Company, Advocates
 Advocate for the Appellant

This **Appellant's Bundle of Authorities** is prepared by **Messrs. Firdaus & Company, Advocates** for the Appellant whose address for service is at Lot 3174, 1st Floor, Luak Bay Commercial Centre, Jalan Luak, 98000 Miri, Sarawak.

MOHD YUSRI MANGSOR & ANOR

v.

PP

Court of Appeal, Putrajaya

Azahar Mohamed, David Wong Dak Wah, Mohd Zawawi Salleh JJCA

[Civil Appeal Nos: A-05-344-12-2011 & A-05-345-12-2011]

21 April 2014

Criminal Law: *Dangerous Drugs Act 1952 — Section 39B(1)(a) — Trafficking in dangerous drugs — Appeal against convictions and death sentences — Possession, whether established — Evidence of prosecution witnesses — Whether prosecution failed to establish prima facie case against both appellants — Whether appellants' convictions plainly unsafe*

This was the appellants' appeal to the judgment of the High Court finding the appellants guilty of the offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA 1952') and sentencing them to death. The central plank of the appellants' argument in this appeal was that the trial judge erred in law and in fact in holding that the prosecution had succeeded in establishing a *prima facie* case against both the appellants by merely accepting the evidence of the prosecution witnesses at face value without subjecting them to a maximum evaluation. According to the appellants, had the trial judge subjected the prosecution witnesses to a maximum evaluation and viewed the evidence from all angles, he would not have called upon the appellants to enter their defence.

Held (allowing the appeal):

(1) What constituted possession was a question of law. But whether, in a particular case, someone was in possession of something was a question of fact. It was trite that to establish possession for the purpose of the DDA 1952, the Court had to consider two separate questions. Firstly, whether the accused was in possession of the offending drugs and, secondly, whether the accused had knowledge of the offending drugs but not the nature thereof. On the facts of the instant case, the prosecution had failed to establish a *prima facie* case against both appellants. There was insufficient evidence to establish that the appellants had possession of the alleged drugs. To sustain a conviction for the offence of possession under the DDA 1952, exclusivity of possession must be proven by the prosecution. It was, therefore, incumbent on the prosecution to discharge this burden. Furthermore, there were also material contradictions in the evidence of the prosecution witnesses which gave rise to serious doubts on the credibility and reliability of such evidence. It must be stressed that the credibility of prosecution witnesses should be subject to judicial evaluation in totality and not isolated scrutiny by the trial Judge. The surrounding circumstances of this case, taken as a whole, would



only cause suspicion against both the appellants. However, suspicion alone was insufficient to form the basis of the conviction. There was doubt in this case, the benefit of which it would have been safer to give to the appellants. Hence, the appellants' convictions were plainly unsafe having regard to the facts and circumstances of this case. (paras 24-27)

Case(s) referred to:

Abdullah Zawawi Yusof v. PP [1993] 1 MLRA 416 (refd)
Choo Yoke Choy v PP [1992] 1 MLRA 405 (refd)
Dato' Mokhtar Hashim & Anor v. PP [1983] 1 MLRA 7 (refd)
Gooi Loo Seng v. PP [1993] 1 MLRA 227 (refd)
Kumaran Sappani v. PP [2012] 6 MLRA 351 (refd)
Lee Chee Meng v. PP [1992] 1 MLRA 209 (refd)
Magendran Mohan v. PP [2012] 5 MLRA 333 (refd)
Mohamad Yuzri Minhat v. PP [2003] 1 MLRA 179 (refd)
PP v. Abdul Rahman Akif [2007] 1 MLRA 568 (refd)
PP v. Fom It Cheong [1990] 3 MLRH 656 (refd)
PP v. Johar Mustafa [2003] 4 MLRH 9 (refd)
PP v. Kang Ho Soh [1991] 2 MLRH 216 (refd)
PP v. Lai Ah Bee [1975] 1 MLRH 148 (refd)
Pang Chee Meng v. PP [1991] 1 MLRA 608 (refd)
Perembun (M) Sdn ; Bhd v. Conlay Construction Sdn Bhd [2012] 2 MLRA 71 (refd)
Saludin Surif v. PP [1997] 1 MLRA 348 (refd)
Sivalingam Periasamy v. Periasamy & Anor [1995] 2 MLRA 432 (refd)

Legislation referred to:

Dangerous Drugs Act 1952, ss 39B(1)(a), (2)

Other(s) referred to:

Sir John Woodroffe & Amir Ali, *Law of Evidence*, 18th Edn, vol 1, p 471

Counsel:

For the appellants: P Ravee; M/s P Ravee & Company

For the respondent: Nurulhuda Nur'ain Mohd Nor; DPP

JUDGMENT

Mohd Zawawi Salleh JCA:

Introduction

[1] This appeal is directed against the judgment dated 18 November 2011 passed by the High Court at Taiping, Perak wherein the High Court found the



appellants guilty of an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA 1952') and sentenced them to death.

[2] Aggrieved, the appellants lodged this appeal to challenge the said impugned conviction and sentence.

[3] The charge against the appellants reads as follows:

'Bahawa kamu pada 26 Julai 2009 jam lebih kurang 8.00 malam di sebuah rumah alamat di No:C1 248, Kampung Changkat Ibol, Bukit Gantang, 34850 Changkat Jering, Taiping di dalam Daerah Larut, Matang dan Selama di dalam Negeri Perak, telah didapati mengedar dadah berbahaya iaitu 83,866 gram Cannabis dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama.'

[4] We have heard learned counsel for the appellants and learned Deputy Public Prosecutor ('DPP') at some length. We have also scrutinized the records available before us. We are mindful that this is a factual based appeal. It is trite that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, there are exceptions. Where:-

- (a) the judgment is based upon a wrong premise of fact or of law;
- (b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;
- (c) the trial judge has completely overlooked the inherent probabilities of the case;
- (d) that the course of events affirmed by the trial judge could not have occurred;
- (e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or
- (f) the trial judge had so fundamentally misdirected himself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion, then an appellate court will intervene to rectify that error so that injustice is not occasioned,

then an appellate court will intervene to rectify that error so that injustice is not occasioned (See *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] 2 MLRA 71, (CA) *Sivalingam Periasamy v. Periasamy & Anor* [1995] 2 MLRA 432 (CA) (CA)).



[5] Having scrutinised the entire evidence adduced before the court, we are of the considered opinion that this is a case in which appellate intervention is warranted. Therefore, we unanimously allowed the appeal and set aside the conviction and sentence passed by the High Court. The appellants are acquitted and discharged.

[6] We now give our reasons for so deciding.

Salient Facts

[7] The salient facts forming the basis for the conviction and sentence of the appellants was that on 26 July 2009, Zabidi bin Abdullah (SP5), a disabled person, went to a house at No:C1 248, Kampung Changkat Ibol, Bukit Gantang, Changkat Jering, Taiping ('the said house'), to meet the 2nd appellant. They then travelled to Juru in SP5's car and reached back to the said house at about 7.00 p.m. According to SP5, when they arrived at the house, a silver coloured Proton Iswara NBW 7795 was parked at the porch, and a Datsun AAD 7355 was parked at the garage located at the side of the house.

[8] On arrival, there was another Proton Iswara which followed SP5's car into the compound and stopped at the garage behind the Datsun AAD 7355. SP5 saw the 2nd appellant speak to the person in the car. The car left moments later.

[9] SP5 was wheeled inside the house by the 1st appellant. SP5 took some Syabu while inside the living room. Both SP5 and the 1st appellant were watching the television programme when the 2nd appellant came in and told SP5: 'duduk sat, saya nak pergi hantar kereta'.

[10] The 2nd appellant returned 20 minutes later with the Proton Iswara Aeroback and parked the car at the garage. According to SP5, the 2nd appellant did not come into the living room after 20 minutes. SP5 then turned towards the window and saw the 2nd appellant carrying a gunny sack from the car towards the back of the house.

[11] After a while, the 2nd appellant still did not come into the living room. SP5 then turned towards the window and saw the 2nd appellant carrying another gunny sack on his back to the back of the house. SP5 asked the 2nd appellant what was in the sack to which the 2nd appellant replied: 'makanan ayam'.

[12] SP5 heard the 2nd appellant call out to his brother for help to carry the gunny sacks. Both appellants were seen dragging 2 gunny sacks each from the car towards the back of the house. Subsequently, both appellants came into the house. According to SP5, Mat Shah (SP6) came shortly afterwards.

[13] At about 8.00 p.m., the police raided the house. According to the raiding officer, ASP Balasubramaniam (SP7), his team ambushed the said house. The gate was wide open so was the door of the said house.



[14] Nothing incriminating was found on both appellants, SP5 and SP6. A further search was conducted outside the house in the presence of the 4 arrested persons. There was a chicken coop at the back of the house and SP7 found 10 gunny sacks covered by blue canvas: 8 sacks were in white, 1 in yellow and another one in green. All the sacks were tied at the mouth and had the word 'THAILAND' written on them. A total of 91 slaps of cannabis wrapped in transparent plastic and aluminium foil were found in those sacks.

[15] Puan Nor Hazili binti Aznan (SP4), a government chemist, had conducted the chemical analysis and confirmed those slabs to be cannabis weighing 83,866 grams in total.

The Defence Case

[16] Both the appellants denied carrying the gunny sacks from the car. The 2nd appellant's evidence was that he left the house to have dinner with one Fadil, who drove a white Honda. He came back to the said house at about 7.45 p.m.

[17] The 1st appellant's evidence was that at about 4.00 p.m., he saw his brother, the 2nd appellant, spoke to the driver of a red Honda. The 2nd appellant then left in the red Honda and returned at about 7.00 p.m. The 2nd appellant then asked him to wheel the driver (SP5) into the house. When he went out to the front porch, he saw a white Honda and a silver coloured Proton Iswara inside the house compound. The 2nd appellant told him that he was going out for dinner, then left the house in the white Honda.

[18] The 1st appellant said that he was chatting with SP5 in the living room. SP6 arrived on a motorcycle and asked for the 2nd appellant. The 1st appellant informed SP6 was out having dinner. The 2nd appellant came back around 7.45 p.m. The house was subsequently raided.

[19] The 1st appellant said that the Proton Iswara NBW 7795 parked at the porch was not in use. The car was locked and DW3, had possession of the keys. This was supported by DW3. She also told the court that the 2nd appellant was not an occupier of the said house.

The Appeal

[20] Before us, the central plank of the appellants' argument was that the learned trial Judge erred in law and in facts in holding that the prosecution had succeeded in establishing a *prima facie* case against both the appellants by merely accepting the evidence of the prosecution witnesses, especially SP5, at the face value without subjecting them to a maximum evaluation. It was submitted by learned counsel for the appellants that the evidence of the prosecution witnesses must not be accepted at face value. Their evidence have to be tested, scrutinized and evaluated to determine whether they suffer from any infirmities, gaps or contradictions of a kind resulting that the main ingredients of the offence are not proven. It is a test of credibility. The evidence has to be scrutinized properly and not perfunctorily, cursorily and superficially.



If the evaluation of the evidence result in doubt in the prosecution's case, then a *prima facie* case had not been made out. (See *Magendran Mohan v. PP* [2012] 5 MLRA 333).

[21] According to learned counsel for the appellants, had the learned trial Judge subjected the prosecution witnesses to a maximum evaluation and viewed the evidence from all angles, the learned trial Judge would not have called the appellants to enter their defence. (See *Gooi Loo Seng v. PP* [1993] 1 MLRA 227). Learned counsel for the appellants strongly urged this Court to reverse the decision of the learned trial Judge.

[22] In reply, learned DPP submitted that the learned trial Judge accepted and believed the testimony of SP5. The reasons given by his Lordship for accepting and believing the testimony of SP5 may be summarized as follows:

- (i) SP5 is a credible witness and had candidly admitted that he took drugs before he went to Juru and while he was at the appellants' house;
- (ii) SP5 was not intoxicated as his conduct before and during the raid was very much sober and he was aware of his surroundings [See *Kumaran Sappani v. PP* [2012] 6 MLRA 351 (FC)]; and
- (iii) SP5 stated that he saw both appellants carrying those gunny sacks from the Proton Iswara to the backyard. Therefore, they were in possession of the offending drugs.

[23] In the course of the arguments, learned DPP had reminded us on the danger of interfering with the finding of credibility of a witness, which is primarily a matter for the trial judge, who had seen and heard the witnesses. (See *Dato' Mokhtar Hashim & Anor v. PP* [1983] 1 MLRA 7.

Our Findings

[24] What constitutes possession is a question of law. But whether in a particular case someone is in possession of something is a question of fact. (See *PP v. Kang Ho Soh* [1991] 2 MLRH 216). It is trite that to establish possessions for the purpose of the DDA 1952, the Court has to consider two separate questions. Firstly, whether the accused was in possession of the offending drugs and secondly, whether the accused had knowledge of the offending drugs but not the nature thereof. (See *PP v. Abdul Rahman Akif* [2007] 1 MLRA 568; *Mohamad Yuzri Minhat v. PP* [2003] 1 MLRA 179; *PP v. Johar Mustafa* [2003] 4 MLRH 9).

[25] We have scrutinised and considered the evidence adduced by the prosecution carefully and we are of the considered opinion that the prosecution had failed to establish a *prima facie* case against both appellants. Our reasons are as follows:



- (a) It remains doubtful whether the 2nd appellant had access to the Proton Iswara. SP6 had stated that when he arrived at the house at 7.40 p.m., he parked his motorcycle behind the Datsun AAD 7735 in the garage. He had not seen the Proton Iswara. Photograph P2E taken by Razali bin Seman (SP1) showed that Proton Iswara NBW 7795 was parked under the porch at the time of the raid. There is no conceivable reason for the 2nd appellant to reverse the car under the porch after he had unloaded the gunny sacks.
- (b) The facts of being present in the living room at the time of raid, are insufficient for the purpose of proving that the 2nd appellant was an occupier of the house. There is no evidence to show that the 2nd appellant is the tenant or the owner of the said house. (See *PP v. Lai Ah Bee* [1975] 1 MLRH 148; *PP v. Fom It Cheong* [1990] 3 MLRH 656). Further, it was not proven that the 2nd appellant was having possession of the car keys. Whether the keys seized by SP7 were the car keys remain an unanswered question. DW3 also stated that she was having possession of the car keys at the material time.
- (c) Another evidential point relates to the issue whether the appellants were carrying the gunny sacks which contained the dangerous drugs. SP5 had stated that both appellants were dragging the gunny sacks from the car to the backyard. The investigating officer, SP9 had confirmed during cross-examination that there were no drag marks or shoe prints on the ground leading to the backyard.
- (d) SP5 stated that both the appellants came into the house after unloading the gunny sacks. SP6 came shortly afterward. His evidence contradicted SP6's evidence when SP6 stated that when he arrived, the 2nd appellant was not in the house and the 1st appellant had informed him that the 2nd appellant had gone out for dinner. The 2nd appellant's defence that he went out for dinner and was sent home by Fadil in the Honda was further supported by SP7's evidence that it was reported by Inspector Ikhbal that a Honda car had dropped the 2nd appellant in front of the house and left.
- (e) SP5's evidence had material contradictions and was seriously irreconcilable with SP6, SP7 and SP9's evidence on the material point. It is clear that the evidence of the prosecution's witnesses are not at all consistent. This gives rise to serious doubt on the credibility and reliability of SP5's evidence. It is trite that when prosecution's witnesses have given conflicting evidence on material facts in issue, the trial judge before whom such evidence



is led must make specific findings on the point and in so doing must give reasons for rejecting one version and accepting the other. Unless this is done, it is unsafe for the Court to rely on any evidence before it. Unfortunately, this was not done by the learned Judge.

- (f) It has to be stressed here that credibility of prosecution witnesses should be subject to judicial evaluation in totality and not isolated scrutiny by the learned trial Judge. When witnesses make inconsistent statements in their evidence either at one state or at two stages, the testimony of such witnesses is unreliable and in the absence of special circumstances, no conviction can be based on the testimony of such witnesses. On the other hand one cannot be unmindful of the proposition that Court cannot mechanically reject the evidence of any witness. With regard to appreciation of evidence in criminal cases it would be of importance to quote what Sir John Woodroffe & Amir Ali had to say in their work on — '*Law of Evidence*', 18th Edn, vol 1 at p 471:

'No hard and fast rule can be laid down about appreciation of evidence. It is after all a question of fact and each case has to be decided on the facts as they stand in that particular case. Where a witness makes two inconsistent statements in his evidence with regard to a material fact and circumstance, the testimony of such a witness becomes unreliable and unworthy of credence.'

- (g) Further, it is the paramount duty of the Court to consider entire evidence of a witness brought on record in the examination-in-chief, cross-examination and reexamination. In other words Courts must take an overall view of the evidence of each witness.
- (h) Granted that the 1st appellant was the occupier of the house and the 2nd appellant had visited the house frequently and the 2nd appellant had also on previous occasions supplied small doses of drugs to SP6. But this evidence is insufficient to establish that they have possession of the alleged drugs. The raiding officer and the investigating officer had admitted that others could easily gain access to the place as the main entrance and the house gate were not locked. It is trite that to sustain a conviction for the offence of possession under the DDA 1952, exclusivity of possession must be proved by the prosecution. It is therefore incumbent on the prosecution to discharge this burden. (See *Abdullah Zawawi bin Yusof v. PP* [1993] 1 MLRA 416; *Pang Chee Meng v. PP* [1991] 1 MLRA 608; *Saludin Surif v. PP* [1997] 1 MLRA 348; *Lee Chee Meng v. PP* [1992] 1 MLRA 209, *Choo Yoke Choy v. PP* [1992] 1 MLRA 405.



[26] The surrounding circumstances of this instance case, taken as a whole, would only cause suspicion against both the appellants. However, suspicion alone is insufficient to form the basis of the conviction. There was doubt in this case, the benefit of which it would have been safer to give to the appellants.

Conclusion

[27] Based on the evidence before us and with all the infirmities and the glaring discrepancies in the prosecution's case as discussed earlier, it is our considered opinion that the conviction was plainly unsafe having regard to the facts and circumstances of this case. When an overall view of the evidence is taken, the irresistible and inescapable conclusion one could arrive upon is that the prosecution has failed to establish its case beyond reasonable doubt and the appellants are entitled to benefit of this doubt, which entitles them to earn an acquittal from the charge.

[28] In the result, we allowed the appeal herein and set aside the conviction and sentence imposed on the appellants. Subsequently, the appellants are acquitted and discharged.



ABDUL AZIZ JAMAL**v.
PP**

Court Of Appeal, Putrajaya
Tengku Maimun Tuan Mat, Ahmadi Asnawi, Zamani A Rahim JJCA
[Criminal Appeal No: J-05-64-03/2015]
4 May 2016

Case(s) referred to:

Muhammed Hassan v. PP [1997] 2 MLRA 311; [1998] 2 MLJ 273; [1998] 2 CLJ 170; [1998] 1 AMR 829 (refd)
Ooi Hock Kheng v. PR [2015] 1 MLRA 425; [2014] 5 MLJ 585 (refd)
PP v. Chia Leong Foo [2000] 1 MLRH 764; [2000] 6 MLJ 705; [2000] 4 CLJ 649 (refd)
Seyedalireza Seyedhedayatollah Ehteshmiardestani v. PP [2014] 5 MLRA 705; [2014] 4 CLJ 406 (refd)
Ugonna Philip Nwanko v. PP [2017] 3 MLRA 140; [2016] 4 MLJ 244; [2016] 2 CLJ 247 (refd)

Legislation referred to:

Dangerous Drugs Act 1952, ss 2, 37(d), (da)

Counsel:

For the appellant: Afifuddin Ahmad Hafifi; M/s Salehuddin Saidin & Associates
For the respondent: Wan Shahrudin Wan Ladin; DPP

[Appeal allowed and set aside the conviction and sentence.]

Case Progression:

High Court: [2015] MLRHU 1455

JUDGMENT

Tengku Maimun Tuan Mat JCA:

Background

[1] The appellant was convicted and sentenced to death by the High Court for an offence of trafficking in dangerous drugs and was convicted and sentenced to six (6) months imprisonment respectively on two charges of possession of dangerous drugs. The imprisonment was ordered to run concurrently from the date of arrest. The charges (exh P1) read:

First Amended Charge

"Bahawa kamu pada 09 Mei 2013 jam lebih kurang 7.45



malam di Stesen Bas Larkin, Kompleks Pengangkutan Awam Larkin, dalam Daerah Johor Bahru dalam Negeri Johor Darul Takzim telah didapati mengedar dadah berbahaya jenis Cannabis berat bersih 13.517 kilogram dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama."

Second Amended Charge

"Bahawa kau pada 09 Mei 2013 jam lebih kurang 7.45 malam, di Stesen Bas Larkin, Kompleks Pengangkutan Awam Larkin, dalam Daerah Johor Bahru dalam Negeri Johor Darul Takzim telah didapati dalam milik kamu dadah berbahaya jenis Heroin seberat bersih 0.23 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah s 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 12(3) Akta yang sama."

Additional Charge

"Bahawa kamu pada 09 Mei 2013 jam lebih kurang 7.45 malam di Stesen Bas Larkin, Kompleks Pengangkutan Awam Larkin, dalam Daerah Johor Bahru dalam Negeri Johor Darul Takzim telah didapati dalam milik kamu dadah berbahaya jenis Monoacetylmorphines seberat bersih 0.19 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah s 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 12(3) Akta yang sama."

[2] Aggrieved by the conviction and sentence for the trafficking charge, the appellant appealed to this Court. We heard the appeal and had unanimously allowed the same. We now provide our reasons.

The Prosecution's Case

[3] On 9 May 2013, a team of police personnel proceeded to the Larkin Bus Terminal, Kompleks Pengangkutan Awam Larkin, Johor Bahru for a drug operation exercise.

[4] At about 7.45 pm, an express bus Supernice bearing registration number PJW 6966 arrived at the Larkin Bus Station. ASP Mohd Isa Bidin (SP4) instructed his team members to tail the bus until it stopped. SP4 saw the appellant alighting from the bus, proceeded to the bus luggage compartment and was seen picking a black bag with wording 'SQPOLO' (exh P16). The appellant hurriedly walked towards the rear of the bus.

[5] SP4 and his team members approached the appellant. Showing his authority card, SP4 said 'police'. Upon hearing 'police' the appellant dropped



P16 and started to run. After a short chase, the appellant was apprehended by Insp Azrul Izwan (SP6) and one Corp Faizal.

[6] SP4 conducted an examination of the black bag exh P1 6. 14 slabs of compressed plant material were found inside P16. Inspector Suhaila binti Taib @ Basar (SP7) sent the 14 slabs to the chemist. Upon analysis by the chemist Abdul Rahim Shadan (SP1), the slabs of compressed plant material were confirmed to be Cannabis weighing 13517 grams. Cannabis is listed as dangerous drugs under the First Schedule of the Dangerous Drugs Act 1952 (the Act).

Findings At The End Of The Prosecution's Case

[7] The learned trial judge accepted the evidence for the prosecution that the appellant was carrying exh P16 and that the appellant 'took to his heels' as soon as SP4 introduced himself as a police officer. His Lordship made an inference that the appellant had the requisite knowledge of the drugs in P16.

[8] Given that there was also evidence that the appellant had possession of the other dangerous drugs which formed the subject matter of the two charges of possession, the learned trial judge made a finding that the appellant's act of running away from the scene spoke volumes of his knowledge of the drugs. From the conduct, the learned trial judge concluded that the appellant must have known the nature of the drug in exh P16 and that the appellant has the ultimate power of disposal of the drugs which he was carrying. The appellant was thus found to have *mens rea* possession of the drugs in exh P16 without the aid of any statutory presumption provided for in the Act.

[9] As for the element of trafficking, the learned trial judge found that there was overwhelming evidence to show that the appellant was carrying and transporting dangerous drugs in large amount. Hence his Lordship made a positive finding of trafficking under s 2 of the Act.

[10] Having found that the prosecution had made out a *prima facie* case, the appellant was called upon to enter his defence.

The Defence

[11] In his evidence given under oath, the appellant stated that he came to Johor Bahru from Butterworth in search of an employment and that he had with him a sling bag which contained his personal belonging, namely clothes, cash, identity cards and hand phones. The sling bag was not produced in court.

[12] The appellant denied that he carried the bag, P16 when he was arrested by the police. He also denied that he had picked up P16 when he alighted from the bus.

[13] Several other witnesses were called by the defence, one of whom was the appellant's friend, Dickson Levy Marie (SD5) who had boarded the bus at



Seremban Bus Terminal and who was also arrested at the Larkin Bus Station. SD5 gave evidence that apart from the sling bag, he did not see the appellant carrying any other bag.

Findings Of The Trial Judge At The End Of The Defence Case

[14] The learned trial judge found that the defence of the appellant was a mere denial which has failed to raise a doubt on the prosecution case and has not rebutted the presumption of trafficking. The appellant was thus convicted and sentenced to death, hence the appeal.

The Appeal

[15] Learned counsel for the appellant canvassed the following grounds of appeal:

- (i) the learned trial judge erred in invoking double presumption of possession and trafficking;
- (ii) the learned trial judge erred in not undertaking a separate test in determining the element of knowledge; and
- (iii) the learned trial judge erred in failing to appreciate the defence sufficiently.

[16] In relation to the first ground, it was the submission of learned counsel that the learned trial judge had misdirected himself in arbitrarily invoking both the statutory presumptions when at the same time his Lordship had made a finding that there was direct evidence to prove *mens rea* possession and trafficking. The learned trial judge had also seriously misdirected himself in invoking both the presumptions under s 37(d) and 37(da) of the Act. On this ground alone, learned counsel submitted that the appellant ought to be acquitted and discharged. Learned counsel relied on two cases decided by this Court, namely *Syedalireza Syedhedayatollah Ehteshmiardestani v. PP* [2014] 5 MLRA 705; [2014] 4 CLJ 406 and *Ugonna Philip Nwanko v. PP* [2017] 3 MLRA 140; [2016] 4 MLJ 244; [2016] 2 CLJ 247.

Our Decision

[17] At the outset we wish to state that regardless of what the prosecution's case was based on, it is incumbent on a trial judge to make a finding whether the prosecution had made out a case of presumed possession under s 37(d) of the Act and direct trafficking under s 2 of the Act; or a case of *mens rea* possession and direct trafficking under s 2 or a case of *mens rea* possession and presumed trafficking under s 37(da).

[18] In the instant appeal, it cannot be said for certain what was the finding of the learned trial judge in convicting the appellant, as it is apparent from the grounds of judgment that his Lordship made two different sets of finding on possession and trafficking at the end of the prosecution's case. To appreciate



the complaint of learned counsel, we reproduce below the judgment of the High Court (Appeal Record Volume 1: p 19 & 21):

"From the (*sic*) evaluating the evidence of the prosecution witnesses there were overwhelming direct evidence to show that the accused had the *mens rea* possession of the drugs in the black bag and in his pocket trouser. His act of running away from the scene spoke volumes of his knowledge of the drugs. The accused must have known the nature of the drug in the black bag and has the ultimate power of disposal of the drugs he was carrying. In this case the Court has no hesitation in coming to a view that base of (*sic*) the evidence of the prosecution's witnesses especially SP4 and SP6 respectively, that the accused had the *mens rea* possession of the drugs in the black bag and in his pocket without the aid of any presumption.

...

The prosecution in their endeavour to prove the third ingredient of the offence has decided to use the aid of the presumption in s 37(da) of the Act. However the Court found that an overwhelming evidence to show that the accused was carrying and transporting dangerous drugs in large amount, a positive finding of trafficking under s 2 of the Act, independent of the presumption of trafficking under s 37(da) of the Act to prove its case. The Court held in the instant case that aid of presumption under s 37(da) of the Act may not be resorted to because of the availability of direct evidence that the accused was carrying and transporting by bus the black bag containing the impugned drugs."

[19] There would have been no leg for learned counsel to stand on had the learned judge stopped at that finding. Nevertheless, his Lordship proceeded to state the following and in so doing, had contradicted his earlier finding (Appeal Record Volume 1: p 22):

"The Court in the instant case and on the available direct evidence and upon a maximum evaluation made a finding of fact that the accused had in his possession an amount of 13,517 grammes of cannabis as listed under s 37(da)(vi), and therefore he was presumed to be trafficking in the said drugs cannabis. ...

...

The Court upon a maximum evaluation of the prosecution evidence was satisfied that the prosecution had successfully proved all the ingredients of the offence and thus had proved a *prima facie* case against the accused and therefore called upon the accused to enter his defence in respect of the offence charged. It was the finding of the Court that the accused had custody and control of the black bag (P16) which contained the impugned drugs hidden and invoking the statutory presumption under s 37(d) of the Act, that the accused is deemed to have been in possession of the impugned drugs and deemed



to have known the nature of the drugs."

[20] From the above quoted passages of the grounds of judgment, we found that the learned trial judge had seriously misdirected himself on several aspects. The first aspect was when his Lordship stated that his finding was made independent of the statutory presumption on one hand, yet on the other hand he invoked the statutory presumption. The second aspect was when the learned trial judge invoked not the presumption of either possession or trafficking but both presumptions of possession and trafficking and the third aspect of the misdirection was when the learned judge failed to rule at the end of the defence case whether the appellant had rebutted the presumptions.

[21] On the first misdirection, we endorsed the judgment of Augustine Paul J (as he then was) in *PP v. Chia Leong Foo* [2000] 1 MLRH 764; [2000] 6 MLJ 705; [2000] 4 CLJ 649 wherein his Lordship said at p 669:

"However if the court had acted on the available evidence in proof of the relevant ingredients without resorting to presumptions there is only an evidential burden on an accused person to raise a reasonable doubt. Thus indiscriminate use of presumptions when there is evidence of the facts to be presumed will be unfavourable to the accused as it will place a heavier burden on him which could have been avoided. Fairness to the accused therefore demands that the presumption provisions are used only when there is no evidence of the facts to be presumed. ... I am therefore of the view that the presumption provisions become inapplicable when there is evidence of the very fact to be presumed. They must be invoked when there is no such evidence or when the evidence available is not safe or satisfactory to be relied upon."

[22] On the second misdirection which occurred when the learned trial judge invoked both the statutory presumptions of possession and trafficking at the end of the prosecution's case, we found that the approach of the learned trial judge was in clear breach of the principle of law enunciated by the Federal Court in *Muhammed Hassan v. PP* [1997] 2 MLRA 311; [1998] 2 MLJ 273; [1998] 2 CLJ 170; [1998] 1 AMR 829.

[23] In *Seyedalireza (supra)* this Court had considered the issue of misdirection by the learned trial judge in invoking both the presumptions under s 37(d) and (da) of the Act in the alternative. We had ruled that the approach of the learned trial judge in not electing or making a finding on which presumption was invoked but by merely relying on the alternative, amounted to a misdirection by way of non direction which had prejudiced the appellant as it impacted on the burden of proof placed on the defence. We consequently set aside the conviction and sentence imposed by the High Court and we acquitted and discharged the appellant. Our decision in *Seyedalireza (supra)* has been affirmed by the Federal Court vide Mahkamah Persekutuan Rayuan Jenayah 05-53-03-2014(B).

[24] In *Ugonna (supra)*, likewise we had set aside the conviction and sentence



of the High Court and we acquitted and discharged the appellant on similar issue of misdirection by the learned trial judge in handling the presumptions and in failing to make a ruling whether the s 37(da) presumption had been rebutted.

[25] Faced with similar issue in the instant appeal, we found no compelling reason to depart from our earlier decision in *Seyedalireza (supra)* and *Ugonna (supra)*. We wish to state that in both these cases, the drugs were found in the bag carried by the appellants.

[26] We move on to the third misdirection. Having invoked the presumptions at the end of the prosecution's case, it was incumbent upon the learned trial judge to rule at the conclusion of the trial whether the presumptions had been rebutted by the defence.

[27] While there was a finding that the appellant had failed to rebut the presumption of trafficking, there was no mention in the grounds of judgment whether the appellant had rebutted or otherwise the presumption of possession under s 37(d) of the Act. Case laws have shown that this omission was a material misdirection, warranting an appellate intervention. Suffice if we quote the judgment of this Court in *Ooi Hock Kheng v. PP* [2015] 1 MLRA 425; [2014] 5 MLJ 585 (P-05-250-2010) where Azhar Mohamed JCA (as he then was) said:

"There is another reason why we had allowed the appeal. At the conclusion of the case for the prosecution, the learned JC had invoked s 37(d) of the DDA to prove possession of the appellant for the Ketamine in the plastic bag. The statutory presumption of possession under s 37(d) is a rebuttable presumption. For this reason, it is incumbent on the learned JC to consider at the end of the whole case whether the presumption that he invoked had been rebutted on a balance of probabilities. A reading of the judgment of the learned JC shows that he had failed to direct his mind on this point. This is a serious misdirection as the law requires the learned JC to make a finding when he resorted to the presumption under s 37(d) of the DDA (see: *Alcontara Ambross Anthony v. PP* [1996] 1 MLRA 47; [1996] 1 MLJ 209; [1996] 1 CLJ 705; [1996] 1 AMR 817, *Tan Boon Kean v. PP* [1995] 2 MLRA 28; [1995] 3 MLJ 514; [1995] 4 CLJ 456; [1995] 3 AMR 3007 and *PP v. Ku Yahya Ku Bahari & Anor* [2001] 1 MLRA 650; [2002] 1 CLJ 113; [2002] 1 AMR 277).".

[28] Premised on the foregoing, we found merit in the first issue raised by learned counsel for the appellant. We were unanimous in our view that the various misdirection and the infirmities in the grounds of judgment of the learned trial judge had rendered the conviction of the appellant unsafe. In the circumstances, we found no necessity to deal with the other grounds of appeal raised by the appellant. We allowed the appeal and set aside the conviction and sentence of the High Court. The appellant was acquitted and discharged.



Pragalathan a/l Balakrishnan v Public Prosecutor

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
W-05(M)-434-11 OF 2016

ZAWAWI SALLEH, KAMARDIN HASHIM AND HARMINDAR SINGH

JJCA

20 JULY 2017

B

*Criminal Procedure — Appeal — Appeal against conviction and sentence
— Trafficking in dangerous drugs — Accused convicted and sentenced to death
— Police carried out surveillance and ambush after receiving information that
accused would sell drugs on motorcycle — Whether motorcycle formed integral part
of prosecution's case — Whether non-production of motorcycle and its owner
detrimental to prosecution's case — Whether prosecution proved charge beyond
reasonable doubt — Whether conviction and sentence safe — Dangerous Drugs
Act 1952*

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Upon receiving information that a certain drug-trafficking activity would take place, a police team led by SP5 proceeded to the said place and carried out surveillance. The appellant was seen riding a motorcycle and stopping by the roadside. When SP5 and his team ambushed the appellant, he was holding a plastic bag. The plastic bag was discovered to contain solid materials which were later confirmed by the chemist to be 1,009g of cannabis. The appellant was subsequently charged at the High Court for trafficking in dangerous drugs, an offence under s 39B of the Dangerous Drugs Act 1952 ('the DDA'). At the end of the prosecution's case, the High Court judge ('the HCJ') found that the appellant had custody and control of the drugs as he was seen holding the bag in which the drugs were found. The appellant was deemed to have possession and knowledge of the drugs under the statutory presumption of s 37(d) of the DDA. Taking into consideration the weight of the drugs, the HCJ further invoked the presumption of trafficking under s 37(da) of the DDA. The appellant was then called to enter his defence. In his defence, the appellant submitted, inter alia, that he was never arrested while he was on the motorcycle; and he had never seen nor had any knowledge of the plastic bag containing the drugs. The HCJ found the appellant's defence to be a mere denial and that he had failed to rebut the statutory presumptions as well as failed to cast a reasonable doubt on the prosecution's case. The appellant was accordingly found guilty, convicted for the offence and sentenced to death. Hence, the present appeal. The appellant submitted that his defence was not sufficiently considered by the HCJ especially when the existence of the motorcycle in question was never proved either by its production in court or through documentary evidence.

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A Held, allowing the appeal:

- (1) The motorcycle was an integral part to the prosecution's case. SP5 had received information that a man would arrive on a motorcycle to sell cannabis in the area, as stated in the charge. Leaving aside the admissibility of such information, the primary focus of the police would have been on the said motorcycle. It was only when the motorcycle arrived that the police team sprung into action. When the appellant was arrested, he was said to have been seated on the said motorcycle with the engine still running. Clearly, there was a connection between the appellant and the said motorcycle, going by the case put forward by the prosecution (see paras 15–16).
- (2) Apart from not being produced: (a) the motorcycle did not appear in the senarai bongkar; (b) there was no record of the motorcycle being released to the owner on a bond; (c) there was not a single photograph of this motorcycle adduced at the trial; and (d) there was no Road Transport Department search to, at least, show the particulars of this motorcycle and especially as to its existence and ownership. The sum effect of these circumstances led to a serious doubt as to the version introduced by the prosecution as to how the appellant came to be in possession of the drugs. It lent credence to the defence version that the appellant had nothing to do with the drugs which formed the subject matter of the charge (see paras 21–22).
- (3) The owner of the motorcycle was a material witness as he would be able to confirm: (a) the identity of the motorcycle and the fact that he was the owner; (b) his relationship with the appellant; (c) if he had indeed obtained custody of the motorcycle; (d) if he knew the motorcycle was at the police station; and (e) if he had allowed the appellant to take the motorcycle or if it was stolen. However, the owner was not produced by the prosecution (see para 16).
- (4) The prosecution left many material question unanswered and failed to prove the charge against the appellant beyond reasonable doubt. The HCJ failed to adequately address material aspect of the defence case which amounted to a serious misdirection by way of non-direction. The appellant's conviction was wholly unsafe. The conviction and sentence passed by the High Court was set aside. The appellant was acquitted and discharged (see para 24).

[Bahasa Malaysia summary]

- I Susulan maklumat yang diterima bahawa satu aktiviti pengedaran dadah akan dijalankan, sepasukan polis yang diketuai SP5 terus ke tempat yang dikatakan dan melakukan pengawasan. Perayu dilihat menunggang motosikal dan berhenti di tepi jalan. Apabila SP5 dan pasukannya menyerang hendap perayu, dia sedang memegang sebuah beg plastik. Beg plastik ini didapati

mengandungi ketulan mampat yang kemudian disahkan oleh ahli kimia sebagai 1,009g ganja. Perayu kemudiannya dipertuduh di Mahkamah Tinggi kerana mengedar dadah, satu kesalahan di bawah s 39B Akta Dadah Berbahaya 1952 ('ADB'). Pada penghujung kes pendakwaan, hakim Mahkamah Tinggi ('HMT') mendapati perayu mempunyai jagaan dan kawalan atas dadah kerana dia dilihat memegang beg tempat dadah tersebut dijumpai. Perayu dikatakan mempunyai milikan dan pengetahuan tentang dadah tersebut bawah anggapan statutori s 37(d) ADB. Mengambil kira berat dadah, HMT selanjutnya membangkitkan anggapan pengedaran di bawah s 37(da) ADB. Perayu dipanggil membela diri. Dalam pembelaannya, perayu menghujahkan, antara lain, dia tidak ditahan semasa dia di atas motosikal; dan dia tidak pernah melihat atau mempunyai pengetahuan tentang beg plastik berisi dadah itu. Hakim Mahkamah Tinggi memutuskan bahawa pembelaan perayu satu penafian semata-mata dan dia gagal menyangkal anggapan statutori serta gagal membangkitkan keraguan munasabah atas kes pendakwaan. Oleh itu, perayu didapati bersalah, disabitkan atas pertuduhan dan dijatuhkan hukuman mati. Oleh itu rayuan ini. Perayu menegaskan bahawa pembelaannya tidak dipertimbangkan secukupnya oleh HMT khususnya apabila kewujudan motosikal yang dipertikaikan tidak dibuktikan baik dari segi pengemukaan di mahkamah mahupun keterangan dokumentar.

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Diputuskan, membenarkan rayuan:

- (1) Motosikal tersebut adalah pelengkap kes pendakwaan. SP5 menerima maklumat bahawa seorang lelaki akan tiba bermotosikal untuk menjual ganja di kawasan tersebut, seperti yang dinyatakan dalam pertuduhan. Menolak tepi kebolehterimaan maklumat ini, fokus utama pihak polis pastinya terhadap motosikal tersebut. Hanya apabila motosikal tersebut tiba barulah pihak polis mula bertindak. Apabila perayu ditahan, dia dikatakan sedang duduk di atas motosikal ini dengan enjin yang masih hidup. Jelas wujud hubungan antara perayu dan motosikal tersebut, melihat pada kes yang dikemukakan oleh pendakwaan (lihat perenggan 15–16).
- (2) Selain tidak dikemukakan: (a) motosikal tersebut tidak dinyatakan dalam senarai bongkar; (b) tiada rekod bahawa motosikal ini diserahkan kepada pemiliknya melalui bon jaminan; (c) tidak terdapat satu pun gambar motosikal yang dikemukakan semasa perbicaraan; dan (d) tiada carian Jabatan Pengangkutan Jalan Raya untuk, sekurang-kurangnya, menunjukkan ciri-ciri motosikal dan, khususnya, kewujudan dan milikannya. Kesan kumulatif hal keadaan ini membawa pada keraguan serius versi pendakwaan tentang bagaimana perayu mempunyai milikan dadah tersebut. Ini menyokong versi pembelaan bahawa perayu tiada kaitan dengan dadah yang membentuk hal perkara pertuduhan (lihat perenggan 21–22).

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- A** (3) Pemilik motosikal tersebut adalah saksi material kerana dia boleh mengesahkan: (a) identiti motosikal dan fakta bahawa dia pemiliknya; (b) hubungannya dengan perayu; (c) jika dia sememangnya mempunyai milikan motosikal; (d) jika dia tahu motosikal tersebut berada di balai polis; dan (e) jika dia membenarkan perayu mengambil motosikal tersebut atau jika motosikal tersebut dicuri. Walau bagaimanapun, pemiliknya tidak dipanggil oleh pendakwaan (lihat perenggan 16).
- B**
- (4) Pihak pendakwaan meninggalkan banyak soalan material tidak berjawab dan gagal membuktikan pertuduhan terhadap perayu tanpa keraguan munasabah. Hakim Mahkamah Tinggi gagal mempertimbangkan secukupnya aspek material kes pembelaan dan ini terangkum dalam salah arahan serius iaitu ketidakarahan. Sabitan perayu langsung tidak selamat. Sabitan dan hukuman yang dijatuhkan oleh Mahkamah Tinggi diketepikan. Perayu dilepaskan dan dibebaskan (lihat perenggan 24).]
- C**
- D**

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 321–500.

E Cases referred to

DA Duncan v PP [1980] 2 MLJ 195, FC (refd)
Kobra Taba Seidali v PP [2014] 2 MLJ 554; [2014] 2 CLJ 12, CA (refd)
PP v Asnawi bin Yusuf [2011] 4 MLJ 16, CA (refd)
PP v Ling Tee Huah [1982] 2 MLJ 324 (refd)

F

Legislation referred to

Criminal Procedure Code ss 112, 413
 Dangerous Drugs Act 1952 ss 37(d), 39B(1)(a)

G Appeal from: Criminal Trial No 45A-66–08 of 2015 (High Court, Kuala Lumpur)

V Samynathan (V Samynathan & Co) for the appellant.
Wong Poi Yoke (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

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Harmindar Singh JCA (delivering judgment of the court):

- I** [1] The appellant was charged in the High Court at Kuala Lumpur for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The charge, which was subsequently amended, read as follows:

Bahawa kamu pada 27/4/2015 jam lebih kurang 10.30 malam, di kawasan TESCO Batu 4, Jalan Klang Lama, dalam daerah Brickfields, Wilayah Persekutuan Kuala Lumpur, telah didapati mengedar dadah berbahaya berat bersih 1009 gram

Cannabis. Oleh itu, kamu telah melakukan kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama. A

[2] After a trial, the appellant was found guilty of the offence as stated in the charge. He was accordingly convicted and sentenced to death by the High Court on 14 November 2016. The appellant then filed this appeal. The appeal was heard on 31 May 2017. At the conclusion of the submissions, we unanimously allowed the appeal. We set aside the conviction and sentence passed by the High Court and substituted in its place an order for acquittal and discharge. Our reasons for doing so now follow. This will form the judgment of the court. B
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THE CASE FOR THE PROSECUTION

[3] The prosecution called five witnesses. The facts leading to the arrest of the appellant were set out in the judgment of the learned judicial commissioner ('judge') as follows (at pp 11–13, appeal record, Vol 1): D

Pada 27.4.2015 jam lebih kurang 7.00 malam, Asisten Superintenden Polis, Mohd Nazri bin Ismail (SP5) telah menerima panggilan telefon dari seorang lelaki yang merahsiakan identitinya, di mana lelaki tersebut memberi maklumat bahawa seorang lelaki India yang menaiki sebuah motorsikal bernombor pendaftaran BMF 5327 akan menjual ganja di kawasan pasaraya TESCO, Batu 4, Jalan Klang Lama, Kuala Lumpur. E

Berdasarkan maklumat ini, SP5 telah mengumpul 12 orang anggota polis dan memberi taklimat berhubung maklumat yang diterima dan tindakan yang selanjutnya. F

Seterusnya pada jam lebih kurang 8.00 malam, SP5 dan anggota pasukannya telah bertolak ke lokasi di kawasan berhampiran pasaraya TESCO tersebut berdasarkan maklumat yang diterima dan tiba di lokasi pada jam lebih kurang 10.00 malam. G

Di tempat tersebut, SP5 telah mengarahkan anggota pasukannya membuat pemantauan di sekitar kawasan pasaraya TESCO berkenaan.

Selanjutnya, setelah hampir 30 minit pemantauan dibuat di tempat tersebut, SP5 melihat sebuah motorsikal bernombor pendaftaran BMF 5327 seperti maklumat yang diberikan, yang ditunggang oleh seorang lelaki India yang kemudian dicamkan sebagai OKT, berhenti di tepi jalan Batu 4, Jalan Klang lama berhampiran pasaraya TESCO berkenaan. H

SP5 dan anggota serbuan seterusnya telah menyerbu ke arah OKT yang ketika itu masih berada di atas motorsikal berkenaan sambil memegang satu plastik biru di tangan kanannya. I

SP5 juga telah memaklumkan SP5 adalah pegawai polis kepada OKT dan ketika itu OKT terkejut dan cuba melarikan diri. Semasa tangkapan hendak dibuat terhadap OKT, berlaku tarik-menarik terhadap plastik biru yang dipegang oleh OKT antara

- A** OKT dan SP5. Akhirnya, SP5 berjaya merampas plastik biru tersebut dari tangan OKT dan tangkapan dibuat terhadap OKT.
- SP5 seterusnya telah membuat pemeriksaan terhadap beg plastik biru tersebut di hadapan OKT dan mendapati di dalamnya mengandungi 1 ketulan mampat yang dibalut dengan plastik lutsinar disyaki ganja.
- B** OKT dan barang kes kemudiannya dibawa ke Ibu Pejabat Polis Daerah Brickfield untuk tindakan lanjut.
- Pada 30.4.2015, bahan ketulan mampat ini telah dihantar ke Jabatan Kimia Malaysia di Petaling Jaya dan setelah dianalisa oleh ahli kimia, SP4, disahkan ianya adalah dadah berbahaya iaitu Cannabis seperti yang ditakrifkan di bawah seksyen 2 ADB 1952 dan seberat 1009 gram.
- C**

- [4]** At the end of the prosecution case, although several issues were raised by counsel for the appellant at the trial, the learned trial judge found that a prima facie case had been established by the prosecution. The learned judge found that the appellant had custody and control of the illicit drugs as he was seen to be holding the blue plastic bag in which the illicit drugs were found. The appellant was therefore deemed to have possession and knowledge of the drugs by the application of the statutory presumption under s 37(d) of the Act. For the element of trafficking, the learned judge invoked the presumption of trafficking under s 37(da) of the Act after taking into account the weight of the drugs seized. The appellant was then ordered to enter his defence on the charge.
- D**
- E**

THE DEFENCE CASE

- F** **[5]** The appellant chose to give evidence on oath. His evidence was summarised by the learned trial judge as follows (at pp 25–26, appeal record, Vol 1):
- G** Pada 27.4.2015, lebih kurang jam 10.00 malam, OKT berada diperhentian bas di Batu 4, Jalan Klang Lama kerana ada temu janji dengan kawan perempuannya bernama Jothi Letchumy yang bekerja di sebuah klinik swasta di kawasan tersebut.
- Di perhentian bas berkenaan, OKT menunggu Jothi Letchumy habis bertugas sambil melayari telefon bimbitnya. Pada ketika itu, OKT mendapati sekumpulan orang telah mengelilingi OKT dan memperkenalkan diri sebagai polis dan salah seorang dari anggota polis tersebut telah menggari tangan OKT. Pihak polis tersebut kemudiannya telah mengambil barang peribadi OKT termasuk telefon bimbit, dompet dan wang tunai RM800.00.
- H**
- OKT menafikan ada menaiki motorsikal BMF 5327 di tempat kejadian. OKT juga menafikan ada duduk di atas mana-mana motorsikal di tempat berkenaan. OKT juga menyatakan bahawa sebuah beg plastik biru telah ditunjukkan kepada OKT oleh SP5 di Balai Polis Brickfield dan tidak pernah melihat beg plastik tersebut sebelum itu.
- I**
- OKT juga tidak tahu siapa pemilik motorsikal BMF 5327 dan tidak mengenali Kalairasan a/l Munusamy yang dikatakan pemilik motorsikal berkenaan.

OKT juga menafikan OKT ditangkap semasa berada di atas motorsikal dan memegang beg plastik biru tersebut.

A

Selain itu, OKT juga menjelaskan OKT tidak mempunyai lesen memandu kereta atau motorsikal.

[6] At the conclusion of the trial, the learned judge appreciated that the appellant's testimony with regard to the drugs in question was at variance with the version given by the prosecution witnesses. The learned judge however did not accept the version of the appellant that he was never arrested whilst he was on the said motorcycle and that he had never seen nor had knowledge of the blue plastic bag containing the impugned drugs.

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[7] The learned judge found no reason to doubt the evidence of the police witnesses SP2 and SP5 who were there when the appellant was arrested. Relying on the cases of *Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324 and *DA Duncan v Public Prosecutor* [1980] 2 MLJ 195, the learned judge came to the finding that the defence of the appellant was a mere denial. The learned judge found that the appellant had failed to rebut the statutory presumptions as well as failed to raise a reasonable doubt in the case for the prosecution. The appellant was accordingly found guilty, convicted and sentenced to death.

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THE INSTANT APPEAL

[8] Before us, although several grounds were listed in the petition of appeal, learned counsel for the appellant attacked the findings of the learned trial judge on one pivotal issue involving the question of possession and knowledge of the impugned drugs.

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[9] The criticism that was fashioned before us was that the defence of the appellant, in that he was not riding the said motorcycle on that fateful day; that he was not sitting on the said motorcycle at the time of his arrest; that he was not holding the impugned blue plastic bag in his right hand; that he had no connection with the said motorcycle; and that he did not know the owner of the said motorcycle, was not sufficiently considered by the learned judge especially when the existence of the motorcycle in question was never proved either by its production in court or through documentary evidence. Although allegedly the owner of the motorcycle was listed as one of the witnesses, he was never called to give evidence.

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[10] Now, to be fair, the learned judge had considered the absence of the motorcycle and its owner and arrived at the following finding as stated in paras 42–43 of the grounds of judgment:

- A** [42] Dalam konteks kes ini, seperti yang telah saya putuskan di akhir kes pendakwaan bahawa pemilik motorsikal BMF 5327 tersebut bukan merupakan saksi material bagi kes pendakwaan dan setelah meneliti pembelaan OKT, saya juga dapati ketiadaan pemilik motorsikal ini tidak menjejaskan naratif kes pembelaan (*sic*). Ini kerana pembelaan OKT antara lain adalah OKT tiada kaitan dengan
- B** motorsikal BMF 5327 dan tidak mengenali pemiliknya. Keterangan yang ada juga tidak menunjukkan dadah ditemui pada mana-mana bahagian motorsikal berkenaan tetapi menurut pihak pendakwaan adalah dirampas dari tangan kanan OKT dan ini telah pun dinafikan oleh OKT dalam pembelaannya.
- C** [43] Sehubungan itu, tiada ketidakadilan yang berlaku tanpa kehadiran pemilik motorsikal berkenaan.

- D** [11] The crucial issue which lies at the heart of this appeal is whether the appellant had rebutted the presumption of knowledge and possession of the drugs which formed the subject matter of the charge. On this score, the appellant had put forward his version of the events relating to the motorcycle during the cross-examination of prosecution witness SP5 as follows (at pp 34–35, appeal record, Vol 2):

- E** Q: Saya cadangkan sebenarnya OKT pada malam itu tidak menaiki motorsikal seperti yang dikatakan oleh tuan, setuju atau tidak?
 A: Tidak setuju.
 Q: Motorsikal berkenaan tidak ada sangkut dengan beliau, setuju atau tidak?
 A: Tidak setuju.
- F** Q: Saya cadangkan ASP tidak masuk motorsikal, anak kunci dan sebagainya dalam P16 sebab motorsikal itu tidak ada kena mengena dengan OKT, setuju atau tidak?
 OKT juga tidak tandatangan dalam borang senarai sebab tidak ada motorsikal?
 A: Tidak setuju.

- G** [12] By this line of questioning, it is plain that the appellant was disputing the version of the prosecution with regard to the appellant being arrested on the motorcycle. In other words, the prosecution was put on notice that their version of events was being challenged.

- H** [13] Now, this stance of the defence could easily have been rebutted by the production of the motorcycle itself or by the evidence of the motorcycle owner who was listed as a witness and, as is normally the case, a police statement would have been taken from him under s 112 of the Criminal Procedure Code ('the CPC'). Having had such notice, the failure to produce the motorcycle or
- I** call the owner to give evidence is a complete mystery.

[14] To venture a guess, it could be that the prosecution felt that the production of the motorcycle was not important and the motorcycle owner was not a material witness. This much appears from the submissions of the learned

DPP to the trial court. It also appears from the judgment of the learned trial judge in that he accepted this contention.

A

[15] In this respect, we are of the view that the motorcycle was integral to the prosecution case. SP5 had received information that an Indian man would arrive in motorcycle BMF 5327 to sell ganja in the area as stated in the charge. Leaving aside the admissibility of such information, the primary focus of the police would have been on the said motorcycle. It was only when the said motorcycle arrived that the police team sprung into action. When the appellant was arrested, he was said to have been seated on the said motorcycle with the engine still running.

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[16] So clearly, there was a connection between the appellant and the said motorcycle going by the case put forward by the prosecution. The owner of the said motorcycle becomes a material witness as he will be able to confirm the identity of the motorcycle and the fact that he is the owner. He will also be able to inform the court as to his relationship with the appellant. He would have been able to confirm if he had indeed obtained custody of the motorcycle that had been detained by the police. He could also confirm how he knew the said motorcycle came to be at the police station. More importantly, he would be able to say if he had allowed the appellant to take the said motorcycle or that perhaps it was stolen.

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[17] Now, to complete the narrative, this motorcycle owner, whose name was given at the trial as Kalairasan a/l Munusamy ('Kalairasan'), was offered and accepted by the defence to be a witness for the defence at the end of the prosecution case in the event the appellant was called to enter his defence. As it turned out, and after the appellant had given evidence, this Kalairasan was not produced by the prosecution. This was obviously an unsatisfactory state of affairs as the learned DPP in her cross-examination of the appellant had adopted the following line of questions (at p 50, appeal record, Vol 2):

F

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Q: Saya cadangkan kepada kamu semasa serbuan dilakukan kamu berada di tempat kejadian berseorangan, setuju atau tidak?

A: Ya, setuju.

H

Q: Dan ketika serbuan dilakukan saya cadangkan juga kepada kamu, kamu berada di atas motorsikal bernombor pendaftaran BMF 5327?

A: Tidak.

Q: Saya cadangkan kepada kamu, kamu kenal pemilik kenderaan tersebut Encik Kalairasan a/l Munusamy?

I

A: Tidak.

Q: Saya cadangkan kepada kamu, kamu biasa meminjam motorsikal daripada Encik Kalai?

A A: Tidak.

[18] The effect of the failure by the prosecution to produce witnesses offered to the defence came up for consideration in *Public Prosecutor v Asnawi bin Yusuf* [2011] 4 MLJ 16 where in a similar case, this court observed (at p 24):

B Learned defence counsel gave ample warning to alert the court and especially to the learned deputy public prosecutor that it was his intention to call those witnesses including but not limited to M Dahlan, Edy Shahputra and Abdul Rahman.

C Now, perhaps curiously, when learned defence counsel wanted the above named three witnesses to testify, the public prosecutor said that all of them were not available. The reason proffered was that they cannot be traced as they are Indonesians! Such reason is simply untenable and indefensible particularly in a case involving the liberty of an individual. We have provisions in our laws to ensure that this would not have happened. It is clear law that when witnesses are offered by the

D prosecution to the defence at the end of the case for the prosecution, it is the bounden duty of the prosecution to avail these witnesses for the defence. If in the exercise of this duty, the prosecution fails to fulfill this obligation, the accused must be acquitted.

E [19] If as the prosecution had told the trial judge that this witness cannot now be located, the prosecution could have at least provided the s 112 of the CPC statement to the defence so that they could then have some opportunity to deal with it or even introduce it into evidence if the law permitted it. In this context, this court in *Kobra Taba Seidali v Public Prosecutor* [2014] 2 MLJ 554; [2014] 2 CLJ 12 had occasion to hold that failure of the prosecution to produce the witness or hand over a copy of the witness statement to the defence to be used by the defence at the defence stage was fatal on the factual matrix of that case.

G [20] Reverting to the instant appeal, there is some serious doubt as to the narrative introduced by the prosecution with regard to motorcycle BMF 5327. Apart from the court testimony of the police witnesses, the only reference to the said motorcycle was in the first information report by SP5 (exh P9) and the *borang serah menyerah* between police officers (exh P10). However, in the *senarai bongkar* (exh P16), which should contain items seized from the appellant, and which contains the signature of the appellant, there is tellingly no mention of the said motorcycle. When confronted with this discrepancy, SP5 claimed that he had overlooked mentioning the said motorcycle in P16.

I [21] Curiously, apart from the fact that the said motorcycle was not produced, and did not appear in the *senarai bongkar* (exh P16), there is no record of the motorcycle being released to the owner on a bond as permitted by s 413 of the CPC. Quite remarkably as well, there is not a single photograph of this motorcycle adduced at the trial. There is also no Road Transport

Department search to at least show the particulars of this motorcycle and especially as to its existence and ownership.

A

[22] In the circumstances, there is merit in the appellant's argument that there was indeed no such motorcycle on the day of the appellant's arrest or at least, that the appellant had nothing to do with the motorcycle in question as he was, as he said, merely waiting at the bus stop for his girlfriend. The sum effect of these circumstances leads to a serious doubt as to the version introduced by the prosecution as to how the appellant came to be in possession of the illicit drugs. Indeed, it lends credence to the defence version that the appellant was merely waiting at the bus stop when he was arrested by the police and he had nothing to do with the drugs which formed the subject matter of the charge.

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[23] In our assessment, as the defence was both reasonable and probable in view of the matters aforesaid, it must follow that there had been a sufficient rebuttal of the presumptions which applied against the appellant. The net effect is that a serious doubt had arisen as to the guilt of the appellant on the charges he faced such that the prosecution could not by any stretch be said to have proven the charge against the appellant beyond reasonable doubt.

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CONCLUSION

[24] In the circumstances, and for the reasons we have given, we were of the view that there were merits in the appeal and that appellate intervention was warranted. Having scrutinised the whole of the evidence, and having regard to our reservations as expressed aforesaid, we found the conviction of the appellant to be wholly unsafe. The prosecution had left many material questions unanswered and the learned judge had failed to adequately address material aspect of the defence case which, in our view, amounted to a serious misdirection by way of non-direction. In short, the prosecution had failed to prove the charge against the appellant beyond reasonable doubt.

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[25] Accordingly, we unanimously allowed the appeal and set aside the conviction and sentence passed by the High Court. The appellant was acquitted and discharged.

H

Appellant's appeal allowed; conviction set aside; appellant acquitted and discharged.

Reported by Afiq Mohamad Noor

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Public Prosecutor v Mansur bin Yahya & Anor

A

HIGH COURT (PULAU PINANG) — CRIMINAL APPLICATION NO 42A-1
OF 2003
KAMALANATHAN RATNAM J
20 FEBRUARY 2004

Evidence — Conflicting testimony — Witnesses contradicted on material points — SP5 stated second accused emerged from room — SP4 testified second accused seated in room — Whether a material clash existed

B

Both accused were charged with two charges of corruption under s (4)(a) of the Anti Corruption Act 1961 read together with s 34 of the Penal Code. After hearing the evidence of the prosecution, the sessions court acquitted and discharged both accused of both charges without their defence being called. The prosecution's appeal to the High Court was dismissed. The prosecution appealed again. At the present appeal, the court found that the prosecution led no evidence against the first accused. The evidence given by the prosecution's witnesses, SP4 and SP11 against the second accused conflicted with the evidence of two other witnesses for the prosecution, SP5 and SP9. SP5 stated that when the second accused was emerging from the room there were marked notes scattered, but SP4 stated that both accused were seated in the room at the material time.

C

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Held, dismissing the appeals:

E

(1) Where there is a conflict of evidence in the prosecution's case itself, and in this case a very material conflict, the benefit of the doubt must be given to the accused. There was no evidence against the first accused. The court dismissed the prosecution's appeal against the first accused (see para 11).

F

(2) As for the second accused, under cross-examination SP5 and SP9 admitted reading their investigation diaries before testifying. In the light of the conflicting evidence of the prosecution about the second accused the court dismissed the appeal against the second accused's acquittal (see paras 13 and 14).

[Bahasa Malaysia summary]

G

Tertuduh-tertuduh telah dituduh dengan dua tuduhan mengambil rasuah di bawah s (4)(a) Akta Pencegah Rasuah 1961 dibaca bersama dengan s 34 Kanun Keseksaan. Setelah mendengar bukti yang dikemukakan oleh pihak pendakwaan, mahkamah sesyen membebaskan dan melepaskan tertuduh-tertuduh daripada kedua-dua tuduhan tanpa pembelaan dipanggil. Pihak pendakwaan merayu terhadap keputusan itu di Mahkamah Tinggi tetapi rayuan tersebut ditolak. Pihak pendakwaan kini merayu semula. Dalam rayuan ini, pihak pendakwaan tidak mengemukakan sebarang bukti terhadap tertuduh pertama. Keterangan yang dikemukakan oleh saksi-saksi pendakwaan, SP4 dan SP11 terhadap tertuduh kedua jelas bercanggah dengan keterangan yang dikemukakan oleh dua saksi pendakwaan yang lain iaitu SP5 dan SP9. SP5 berkata bahawa semasa tertuduh kedua muncul daripada bilik itu terdapat wang yang ditandakan berselerak, tetapi SP4 berkata bahawa kedua-dua tertuduh sedang duduk di dalam bilik itu pada masa itu.

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A Diputuskan, menolak rayuan-rayuan itu:

(1) Di mana terdapat percanggahan keterangan di dalam kes pendakwaan, dan di dalam kes ini percanggahan yang material, faedah kesangsian mesti diberi kepada tertuduh. Tiada keterangan terhadap tertuduh pertama. Mahkamah menolak rayuan pendakwaan terhadap tertuduh pertama (lihat perenggan 11).

B (2) Mengenai tertuduh kedua, semasa disoal balas SP5 dan SP9 mengaku membaca diari penyiasatan sebelum memberi keterangan. Memandangkan percanggahan keterangan pendakwaan itu mengenai tertuduh kedua mahkamah menolak rayuan terhadap pembebasan tertuduh kedua (lihat perenggan-perenggan 13 dan 14).]

C Notes

For cases where witnesses contradicted on material points, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 804.
For witnesses generally, see 12 *Halsbury's Laws of Malaysia*, para [210.137].

D Legislation referred to

Anti Corruption Act 1961 s 4 (a)
Penal Code s 34

Zulqarnain bin Hassan (Attorney-General's Chambers) for the prosecution.
E *M Athimulan (Athimulan & Co) for the first accused.*
S Anthonisamy (Aziz Anthony & Co) for the second accused.

Kamalanathan Ratnam J:

The charges

F [1] Both the accused, a Corporal and a Lance Corporal are policemen attached to the Pejabat Peronda Lebuhraya. They faced two charges of corruption. The charges read as follows:

First charge:

G Bahawa kamu dengan niat bersama pada 25 Ogos 1997, jam lebih kurang 1.15 petang, di Pejabat Peronda Lebuhraya Butterworth-Kulim, Plaza Tol Kubang Semang, didalam daerah Seberang Perai Tengah, di dalam Negeri Pulau Pinang, sebagai agen Kerajaan Malaysia, iaitu Kpl 73103 dan L/Kpl 92675, iaitu anggota Polis DiRaja Malaysia, bertugas di Unit Peronda Lebuhraya Butterworth-Kulim, telah secara rasuah menerima suatu suapan untuk diri kamu, iaitu, wang tunai berjumlah RM50 dari seorang, iaitu U Thamocharan a/l Uthirapatai, sebagai suatu dorongan untuk tidak melakukan suatu perbuatan berhubung dengan urusan prinsipal kamu, iaitu, untuk tidak menyaman seorang, Ganesan a/l Krishnan yang memandu lori No WEY 3074 kepunyaan U Thamocharan a/l Uthirapatai, yang dikatakan telah melakukan kesalahan lalu lintas iaitu, kain tarpan koyak dan dinding lori lekat pasir, dengan itu kamu telah melakukan satu kesalahan di bawah s 4(a) Akta Pencegah Rasuah 1961 (Undang-Undang Malaysia No 57) dibaca bersama s 34 Kanun Keseksaan.

I Second charge:

Bahawa kamu dengan niat bersama pada 25 Ogos 1997, jam lebih kurang 1.15 petang, di Pejabat Peronda Lebuhraya daerah Seberang Perai Tengah, di dalam

Negeri Pulau Pinang, sebagai agen Kerajaan Malaysia, iaitu Kpl 73103 dan L/Kpl 92675, iaitu anggota Polis DiRaja Malaysia, bertugas di Unit Peronda Lebuhraya Butterworth-Kulim, telah secara rasuah menerima suatu suapan untuk diri kamu, sebagai bayaran bulanan, iaitu, wang tunai berjumlah RM250 dari seorang, iaitu U Thamotharan a/l Uthirapatai, sebagai suatu dorongan untuk tidak melakukan suatu perbuatan berhubung dengan urusan prinsipal kamu, iaitu, untuk tidak mengambil tindakan ke atas pemandu 3 (tiga) buah lori kepunyaan U Thamotharan a/l Uthirapatai, yang melalui Lebuhraya Butterworth-Kulim, dengan itu kamu telah melakukan satu kesalahan di bawah s 4(a) Akta Pencegah Rasuah 1961 (Undang-Undang Malaysia No 57) dibaca bersama s 34 Kanun Keseksaan.

Facts

[2] On 13 August 1997, both the accused were on patrol duty along the Butterworth/Kulim Highway. Both the accused detained a lorry driver SP1 along the Highway for an alleged traffic offence. After some discussion, both the accused asked SP1 for the hand phone number of the owner of the said motor lorry. No summons was issued for any breach of any law. SP1 handed them his employer's handphone number.

[3] The next day the first accused telephoned the owner of the lorry ('SP8') and informed him that he wanted to discuss a matter with him. On 21 August 1997 at 1.30pm, the first accused again telephoned SP8 and had a discussion after which SP8 made a report at the Anti Corruption Agency ('BPR') at 3pm on the same day.

[4] The BPR decided to record the conversation between SP8 and the first accused and this was done on 22 August 1997 and a copy of the transcript of the conversation was tendered in court. Subsequently, two other conversations were also recorded. There was nothing incriminating in all the three conversations.

[5] Subsequently on 25 August 1997, SP8 and a BPR Officer ('SP2') went to the accused's office. SP8 was given marked notes by the BPR. At the office SP8 handed over the marked notes amounting to RM300 to the second accused and this was witnessed by SP2. There was no evidence however if the money was in an envelope or given as cash. They then came out of the office and gave the pre-arranged signal of wiping the face and combing the hair to the BPR officers who were stationed outside the office.

[6] Immediately thereafter, three BPR Officers namely SP5, SP9 and SP10 rushed into the office. They however found the said RM300 lying scattered in another room.

[7] The above are the undisputed facts.

Findings of the court

[8] After hearing the evidence of the prosecution, the learned sessions judge acquitted and discharged both the accused of both charges without their defence being called. Dissatisfied with the said decision, the public prosecutor appealed. I heard the appeal and also dismissed the same. Dissatisfied with my decision, the public prosecutor has again appealed. These are my reasons for dismissing the appeal.

- A** [9] The evidence against the second accused is to be found in the evidence of SP2, the BPR Officer who accompanied SP8. According to SP2, when SP8 handed over the marked notes, the second accused received them, counted the notes and put them into his right pocket. At that time both the accused were seated at their respective tables. As soon as SP2 and SP8 walked out and gave the signal that the money transaction had been completed three other officers namely SP5, SP9 and SP10 rushed in. SP5's evidence was that as soon as he entered the room, the first accused was seated at his table but the second accused was then emerging from the room where the marked notes were found scattered. SP5 then warned the second accused. This evidence of SP5 was corroborated by the other BPR officer, SP9.
- B**
- C** [10] However, the prosecution also called SP4, another policeman who shared the office with both the accused. He testified that when the BPR Officers burst into their common office, there were four of them including the two accused, and that all four were in fact seated at their respective tables. SP11, the other policeman who was in the room confirmed this evidence. Both SP4 and SP11 confirmed that the BPR Officers directed all four of them to remain seated as they were.
- D**
- [11] This is a case where there is a conflict of evidence in the prosecution's case itself. I do not know why the prosecution decided to call as witnesses SP4 and SP11. But having called them as material witness this court has no reason to reject their evidence which clearly was in conflict with the evidence of SP5 and SP9. Two witnesses say the second accused remained seated at his desk. Two witnesses say that he was coming out of the room where the marked notes were found.
- E**
- [12] The law in such a situation is clear. Where there is a clash of evidence in the prosecution's case itself, and in this case a very material clash, the benefit of the doubt must be given to the accused. Up to this stage, there was no evidence against the first accused. So I dismissed the appeal of the prosecution against the first accused.
- F**
- [13] As for the second accused, under cross-examination SP5 and SP9 admitted reading their investigation diaries before testifying.
- G** [14] In the light of the conflicting evidence of the prosecution that the second accused was in fact seen coming out of the room in which the marked notes were found scattered and in the light of the other credible evidence that showed that he had never moved from his seat, I dismissed the appeal against the second accused's acquittal. Further, no evidence was led to show if any finger prints of both accused were found on the marked notes.
- H** *Appeals dismissed.*

Reported by R Lalitha

I

PP

v.

HANIF BASREE ABDUL RAHMAN

[2008] 1 MLRA 220

Federal Court, Putrajaya

Zaki Tun Azmi PCA, Arifin Zakaria, Nik Hashim, Hashim Yusoff, Zulkefli
Makinudin FCJJ

[Criminal Appeal No: 05-4-2005(W)]

28 March 2008

Criminal Law: *Penal Code — Section 302 — Murder — Appeal against the acquittal and discharge of accused without defence being called — Assessment of circumstantial evidence — Whether trial judge was correct in acquitting and discharging accused without defence being called*

Criminal Procedure: *Acquittal or discharge — Appeal against the acquittal and discharge of accused without defence being called — Whether evidence carefully evaluated — Whether discovery of accused's DNA sufficient to prove commission of offence — Whether witnesses were credible — Whether trial judge erred in acquitting and discharging the accused*

Evidence: *Witness — Credibility — Whether the trial judge was right in rejecting witnesses' evidence — Whether trial judge was correct in acquitting and discharging accused without defence being called*

The respondent/accused was charged with the murder of his intimate friend, one Noritta Samsuddin ('the deceased') on 5 December 2003 in a condominium at Sri Hartamas, Kuala Lumpur. However, the accused was discharged by the learned trial judge without being called for his defence during the close of the prosecution's case. The prosecution had appealed to the Court of Appeal and it was dismissed. Hence, this appeal was filed against the dismissal of the said appeal. Based on the facts of the case, the deceased was found by her apartment mates (SP12 and SP28), with the deceased's mouth stuffed with two face towels facing downwards and her hands and legs were tied up with brassiere and electrical cord respectively. Wet tissue papers were found by the Senior Investigating Officer ('SIO') from a waste paper basket in the deceased's room. The issues to be addressed in this appeal were: (1) whether from the pathologist's and chemist's evidence, it could be irresistibly concluded that the accused was the last person to have had sexual intercourse with the deceased and therefore was the one who caused her death; (2) whether there was a conclusion from the discovery of the said wet tissue papers in the deceased's room; (3) whether there was a man with foul body odour present in the room on the night of the incident; (4) whether there was an unknown male who had been referred to as 'unknown male 1'; and (5)

whether the guards on duty at the condominium that night, SP10 and SP11 did actually see the accused together with the deceased a few hours before her death.

Held (dismissing the appeal):

Per Zaki Tun Azmi PCA

(1) The wet tissue papers found in the deceased's room which were proven to be stained with semen was considered as insufficient evidence to support the prosecution's case. The chemist had conducted an experiment as to how long it took until semen on the tissue would dry up in an air-conditioned room. There was a difference between the said wet tissues and the one in the experiment. The tissue that was spread out took shorter time to dry up compared to the ones in the present case, which were balled up under a pile of clothing. Further, there was no evidence to show the amount of semen used by the chemist in the experiment compared to the semen found on the wet tissues. (para 8)

(2) In relation to the evidence of the man with foul body odour which was introduced by the prosecution, no evidence was adduced to support it. According to the prosecution, the accused's body could have given out such odour after having sexual intercourse with the deceased and having worked hard to tie her hands and legs. However, there was not an iota of evidence to support this allegation. The statement of the prosecution's witness, SP28 which stated that the accused did not have such body odour was also not challenged by the prosecution. (paras 10, 11 & 12)

(3) The DNA profile of an identified male person was discovered by the chemist from the swabs taken from the deceased's body part and it did not match the accused's DNA profile. (para 13)

(4) It was contended that the trial judge had erred in rejecting the evidence of SP10 and SP12 but nothing could support such contention. According to SP10, he did see the accused together with the deceased in the early morning of 5 December. However, during re-examination, SP10 stated that he did not see the accused leaving the condominium despite the accused must have passed him if he did leave. Therefore, it was clear that the trial judge was correct to reject the evidence of SP10 and SP11. (paras 18, 19 & 20)

(5) The prosecution could not make out a case based on the DNA profiles discovered on the deceased body. The prosecution's case became hampered with the existence of the DNA belonging to the 'unknown male 1'. The discovery of the accused's DNA, however, was not enough to have him guilty as many inferences could be drawn as to how the accused's DNA was found on the deceased provided the intimate relationship between the accused and the deceased. Hence, such evidence was not sufficient to conclude that the accused was the one who caused the death of the deceased. If there were reasonable explanations as to why his DNA was found in those circumstances, the benefit must be given to him and he must be acquitted and discharged. (paras 24 & 25)



(6) In the present case, the trial judge had correctly examined the evidence adduced before him and had correctly applied the principles in assessing circumstantial evidence. Furthermore, there was a reasonable likelihood of the existence of another person who could be responsible for the deceased's death. The prosecution had failed to rebut the evidence of discovery of DNA belonging to 'unknown male 1' and the existence of foul body odour in the apartment. Hence, the trial judge was correct in deciding not to call the accused to enter his defence and acquitting and discharging the accused at the close of the prosecution's case. (paras 34, 35 & 36)

Case(s) referred to:

Balachandran v. PP [2004] 2 MLRA 547; [2005] 2 MLJ 301; [2005] 1 CLJ 85; [2005] 1 AMR 321 (*refd*)

Belhaven & Stenton Peerage [1875-1976] App Cas 278 (*refd*)

Dalip Bhagwan Singh v. PP [1997] 1 MLRA 653; [1998] 1 MLJ 1; [1997] 4 CLJ 645; [1997] 4 AMR 4029 (*refd*)

Dato Mokhtar Hashim v. PP [1983] 1 MLRA 7; [1983] 2 MLJ 232; [1983] CLJ (Rep) 101 (*refd*)

Idris v. PP [1960] 1 MLRA 265; [1960] 1 MLJ 296 (*refd*)

PP v. Ishak Hj Shaari & Other Appeals [2003] 1 MLRA 522; [2003] 4 MLJ 585; [2003] 3 CLJ 843; [2003] 5 AMR 401 (*refd*)

PP v. Mohd Radzi Abu Bakar [2005] 2 MLRA 590; [2005] 6 MLJ 393; [2006] 1 CLJ 457; [2005] 6 AMR 203 (*refd*)

PP v. Muhamad Nasir Sharuddin & Anor [1992] 2 MLRH 390; [1994] 2 MLJ 576; [1992] 3 CLJ (Rep) 408 (*refd*)

R v. Abbot [1955] 2 All ER 899 (*refd*)

Legislation(s) referred to:

Criminal Procedure Code, s 180(1), (2), (3)

Federal Constitution, art 7

Counsel:

For the appellant: Wong Chiang Kiat (Roszianayati Ahmad & Nurulhuda Nuraini Mohd Nor With Him); AG's Chambers

For the respondent: V Sithambaram (Rajivan Nambiar, Mohd Haaziq Pillay & Robert Devan With Him); M/s Sitham & Assoc

JUDGMENT

Zaki Tun Azmi PCA:

[1] The respondent in this appeal who is the accused (and hereinafter referred to as “the accused”) was charged for the murder of his intimate friend, one Noritta binti Samsuddin (hereinafter referred to as “the deceased”) on the 5 December 2003 between 1.30am and 4am in an apartment known as D-7-1 Kondominium Puncak Prima, Galeria, Jalan 17, Sri Hartamas, Kuala Lumpur. At the close of the prosecution’s case he was acquitted and discharged by the learned trial judge without being called for his defence. The Public Prosecutor now appeals to this court against the dismissal of that appeal by the Court of Appeal.

[2] The deceased’s body was found by her apartment mates, Kenneth Michael Yap Tiek Huat (SP12) and his girl friend and roommate, Nor Azora bte. Abdul Hamid (SP28) at about the time mentioned in the charge. She was found facing downwards and with her mouth stuffed with two face towels. Her hands were tied behind her with a black brassiere. Her legs were also tied but with a black electrical cord. Wet tissue papers were recovered from a waste paper basket in the deceased’s room by SP29, ASP Shahrul Lailli bin Masduki, the Senior Investigation Officer (SIO).

Issues

[3] The facts of the case were very well spelt out in the judgment of the High Court and that of the Court of Appeal. I do not need to regurgitate them here. I will only refer to those facts that are subject of dispute. Broadly, the main issues are:-

- a) Whether from the pathologist’s and chemist’s evidence it can be irresistibly concluded that the accused was the last person to have sexual intercourse with the deceased and therefore was the one who caused her death.
- b) What can be concluded from the recovery of the wet tissue papers from the waste paper basket in the deceased’s room by the SIO?
- c) Was there a man with foul body odour present in that room on the night of the incident?
- d) Was there an unknown male who had been referred to as “Unknown Male 1”?
- e) Whether the two guards did actually see the accused together with the deceased and two Malay couples in a Kancil a few hours before her death.



Pathologist And Chemist Findings

[4] The deceased's body was taken for post mortem which was carried out by Dr Abdul Halim bin Mansor who was the Director of Institute of Forensic Medicine, Hospital Kuala Lumpur (SP13). From the post mortem the following are what, amongst others, SP13 discovered:-

- a. She had died of asphyxia.
- b. The brassiere and the electrical cord were tied to the deceased's hands and feet respectively, **after** her death.
- c. He discovered hymen tears in the external genitalia of the deceased which must have been caused **more** than 72 hours before she died.
- d. Tears were also found at the deceased's anus but these tears occurred **less** than 72 hours before her death. These tears, in his opinion, could have been caused by a blunt object like the penis or finger

The DNA profile from the swabs taken from this part of the deceased's body showed that it belonged, to use the words of the chemist, Mr Lim Kong Boon, Government Chemist attached to the Government Chemistry Department, Petaling Jaya (SP14), - "to an 'Unknown Male 1' ". It did not match the DNA profile of the accused..

- e. In the deceased's vagina the pathologist found "... terdapat cecair bertakung di dalam vagina simati dengan banyak. Banyak cecair seperti ini dari pengalaman saya luar biasa...". He said the fluid found was the result of ejaculation of semen together with fluid of the deceased.

[5] I now go to the findings of the chemist. According to the chemist (SP14) the estimated composition of the DNA extracted from the semen found in the vaginal swab of the deceased is as follows:-

- (a) Major contributor 60 - 70% which is that of the accused;
- (b) The intermediate contributor 20 - 25% which is that of the deceased and.
- (c) the minor contributor of 10 - 15% which is of the unknown male

[6] In his opinion "... based on the DNA result obtained from the mixed semen stains from "high vaginal swab", normally indicates that the major contributor is the last person to have sex with the victim." He qualified his opinion by saying that "However, this finding or inference is dependant on a number of factors, such as:-

1. The volume of semen ejaculated into the vagina;



2. The number of spermatozoa contained in the ejaculated semen; and

3. The lapse of time between the 2 sexual intercourses where semen were ejaculated into the vagina.

[7] Other relevant exhibits of forensic evidence discovered by the chemist (SP14) were as follows:-

a. Eleven (11) pieces of tissue papers found in the waste paper basket in the deceased's room which contained DNA of the accused and the DNA of the deceased. The prosecution relied heavily on this evidence to support their case. They contend that because the tissue papers were still wet when the tissue papers were found by the SIO, at about 7am that morning and since these tissue papers contained the DNA of the accused, the accused must have been the last person to have sexual intercourse with the deceased. This evidence, according to the prosecution is supported by the other opinion of the chemist (SP14) on the high proportion of the accused's DNA in the fluid found in the vagina of the deceased, which showed that the accused was the last person to have sexual intercourse with the deceased..

b. The black brassiere that was used to tie the hands of the deceased was found to bear the DNA of Unknown Male 1.

c. Finger nail clippings of the deceased's right hand fingers also have the accused's DNA and the finger nail clippings of the deceased left hand fingers had the DNA of the accused as well as that of the Unknown Male 1.

d. Strands of hairs recovered from the deceased's comforter and bed sheet also bear the DNA belonging to Unknown Male 1.

e. The electrical cord used to tie the deceased's legs had the DNA of the Unknown Male 1 as well as that of the deceased.

Tissues

[8] At first sight the wet tissues discovered in the waste paper basket in the deceased's room, subsequently proven to be stained with the semen of the accused, seem to support the prosecution's case but on closer examination, they do not. The defence rightly pointed out to the court that the tissues were found under a pile of clothings *ie* "... yang pertama ialah sehelai baju tidur, kedua sehelai seluar pendek warna hitam, ketiga satu coli warna beige, keempat segumpal tisu..." The tissues were crumpled up together ("segumpal"). In this respect the chemist at the request of the DPP did a test of putting a few drops of semen that he got from his laboratory refrigerator, on a couple of tissue papers. According to him it took between 1 to 1 1/2 hours in an air conditioned room for them to dry up. From this, according to the learned DPP, since a



substantial amount of the accused's semen was found on the tissue papers, and still wet, accused must have used these tissue papers not long before they were discovered by the SIO. From the test conducted by the chemist, it is urged by the learned DPP that the accused could have used the tissue papers within 1 to 1 1/2 hours before the tissue papers were found. It appears to me it does not need an expert to know the different effects *viz.* the tissue papers that were dripped with semen and spread out in an air conditioned room will dry very much faster than if kept in the form of a ball under stack of clothing. There is also no evidence as to the amount of semen used by the chemist in his experiment compared with that found on the contaminated tissues.

The Man With The Foul Body Odour/Unknown Male 1

[9] SP12 and his girl friend cum roommate SP28 arrived at the condominium at about 4am in the early morning of 5 December 2003. On their arrival they found the door to their apartment locked. When they went in they did not switch on the lights as they had intended to go to bed immediately. SP28 said that on opening the door "... ada hidu bau busuk macam bau badan dan keadaan rumah gelap... dan busuk itu daripada mula masuk pintu utama rumah sehingga kawasan meja makan...". She then looked for the source of the odour. She was expecting a friend of the deceased to be sleeping in the lounge area. As she was looking for the source of this odour "... saya terpendang susuk tubuh orang di sebelah kanan saya, sekali imbas..." Ignoring that she proceeded to her room but at this point in time, she noticed that the entrance door which she and her roommate SP12 had earlier locked had been unlocked ("tidak berkunci"). She sensed something was wrong and asked SP12 to call the guard. In the mean time she proceeded to the deceased's room and called out the deceased's name. There was no answer. She went into the room and that was when she discovered the deceased under the blanket in the condition described earlier in this judgment.

[10] Apart from the evidence of SP28 that she saw a glimpse of a man while in the apartment, she testified later she also saw someone putting on his shirt while walking away from the condominium. She called out to the man and the guard. There was no response from either of them. She then went down to look for the man but to no avail. The same was told by SP12. He further said that he never experienced such body odour before. If, according to the evidence of the prosecution, the accused had been visiting the apartment before and that the body odour belonged to the accused they should have experienced such odour. The prosecution seemed to have accepted the evidence of the SP12 since there was no questioning on this issue.

[11] It must be noted that the evidence of the man with the foul body odour was introduced by the prosecution. Although in his submission the learned DPP attempted to argue that the accused's body could have given out such an odour after having sexual intercourse with the deceased and having worked hard to tie her hands and her legs, there was however not an iota of evidence



whatsoever to support his contention. On the contrary SP28 did say that the accused did not have such a body odour. This statement by SP28, (who is the prosecution's witness) was not challenged by the prosecution. Neither was any attempt made by the prosecution to show any disagreement with this evidence of SP28 during examination.

[12] From the evidence so far, we have the person with the foul body odour and the other person who was seen walking away while putting on his shirt. There is no proof that they were one and the same person.

Unknown Male 1

[13] The chemist found DNA of an unidentified male person from the deceased's vagina, swab from the deceased's rectum, semen stain on the bolster, the black brassiere, finger nail clippings of the left hand of the deceased, strand of hairs found on the comforter and finally the electrical cord used to tie the legs of the deceased. The chemist referred to this person as the "Unknown Male 1".

Kancil And Two Malay Couples

[14] Now comes the question whether the accused and the deceased did go up to her apartment after allegedly meeting their friends at the car park earlier to the discovery of the deceased's body.

[15] The prosecution sought to support their case against the accused by adducing evidence of the two guards to the condominium. They were SP10 and SP11. The learned trial judge rejected the evidence of these two witnesses as being unreliable.

[16] SP10 and SP11 were two guards on duty at the condominium that night. According to them they had seen the deceased and the accused on many occasions at the condominium before.

[17] In his examination in chief, SP10 testified as follows. He said that at about 1am that night, he saw the deceased and the accused going out in front of the guardhouse located next to the road. He saw both of them chatting with two other men and two women. These two couples had come to the condominium in a white coloured Kancil car. The place where they were chatting was sufficiently bright. The Kancil was parked under a street lamp. He saw them chatting for about 10 to 15 minutes. He saw the registration number of the Kancil but could not remember it. After that the accused and the deceased went back into the condominium passing the guardhouse. They went through a small door at the right side of the guardhouse. He saw the accused before 1am that night *ie*, a few hours before the commission of the alleged offence. The accused was wearing jeans with long sleeved white T-shirt with grip cuffs. The deceased on the other hand was wearing short pants up to her knees with a long T-shirt.



[18] During cross examination SP10 clarified that he did not tell the police that he saw the accused and the deceased that night or at any time until 18 December 2003. He only disclosed these facts after 13 days of daily visits to the police station and only after he was arrested and remanded as a suspect. Prior to his arrest he told the police that the last time he saw the accused was on the night of the 4th. According to him after he told the police on the 17 or 18 December 2003 that he saw the accused and the deceased on the 5th morning, the police released him.

[19] SP11 gave similar testimony regarding the white Kancil and the two Malay couples. As regards the apparel worn by the accused and the deceased on the night of the incident, SP11 said the accused was wearing blue jeans and grey coloured T-shirt while the deceased was wearing black shorts and singlet. SP11 also did not tell the police of this incident until about the 19 December 2003 *ie*, 14 days or so after the incident. Prior to 19 December 2003 SP11 kept telling the police the last time he saw the accused and the deceased walking into the condominium was on the 4 December 2003. He was also under arrest and detention when he claimed to have revealed this to the police. He was arrested on 19th and released on 20 December 2003. SP11 was then also accused of having committed the offence. He could not explain when questioned by the defence as to how the accused could have left the condominium if the accused was really there in the morning of 5 December 2003. Cross examination on him was as detailed as that done on SP10. In this respect SP11 confirmed in his re-examination that the accused had to pass him to go out and yet he did not see the accused leaving the condominium that night.

[20] There is nothing to support the contention that the trial judge had erred in rejecting the evidence of SP10 and SP11. In fact reading through the notes of evidence in detail, and for reasons discussed earlier, I am of the view that the judge was right in rejecting the evidence of these two witnesses with regard to them having seen the accused and the deceased in the early morning of 5 December 2003.

DNA As Proof Of Identity

[21] The discovery of the use of DNA (deoxyribonucleic acid) has really revolutionized criminal investigations. Its use has assisted in getting convictions of the guilty and release of the innocent.

[22] The prosecution's case is based on the discovery of DNA of the deceased, accused, and the "Unknown Male 1". Simply put, in practice, the DNA profile of a person can only belong to that person and that person only. The likelihood of another person having an identical DNA to him, according to SP14, is in the proportion of, something like, between 1 in 41 million, to 330 x 10¹⁸, in 6.2 quintillion (6.2 x 10¹⁸) calculated based on Malaysian Malay database depending on the type of specimen. In other words such proof is practically conclusive. But in order to be able to utilize DNA for identification of a person, the person who has that DNA profile must be identified and related to a sample



of his body fluid or any other part of his body. An expert in DNA can only say whether the DNA belongs or does not belong to an identified person. DNA found without a suspect is of no use.

[23] Therefore it is only when a person is identified and the DNA matches that of the identified person can it be of any use towards solving a crime investigation. But even then the prosecution needs to go one step further to show that the DNA of the suspect (together with any other evidence) is such that it points to one conclusion only, *ie*, that the offence was committed by the suspect.

[24] In this case the DNA of the “Unknown Male 1” becomes useful only to determine that the DNA belongs to that man. Unfortunately the identity and therefore DNA of that person was unknown. Perhaps sometime in the future there will be a register of DNA profiles like what we now have of thumbprints which will assist the police to trace the owner. The accused’s DNA found in circumstances that may have created suspicion of his guilt is not enough to prove his guilt. If there are reasonable explanations as to why his DNA was found in those circumstances, the benefit must be given to him and he must be acquitted and discharged.

[25] In this case, the prosecution’s case becomes hampered with the existence of the DNA belonging to the “Unknown Male 1”. Several inferences could be made from the findings of such evidence on the body of the deceased. The discovery of the accused’s DNA profile on the body of the deceased *per se* cannot be sufficient to conclude that he caused her death. There could be so many explanations why his DNA was found on her body. Bearing in mind the accused’s intimate relationship with the deceased, innocent explanations could be given of such findings. The accused is not charged with having intimate relations with the deceased.

Circumstantial Evidence

[26] Since the prosecution is relying on circumstantial evidence to prove its case it would be pertinent for me to briefly cite the relevant aspect of the law on circumstantial evidence.

[27] Circumstantial evidence is defined in no better words than in the remarks in the case of *Idris v. PP* [1960] 1 MLRA 265; [1960] 1 MLJ 96, which quoted Lord Cairns’ in the House of Lords case of *Belhaven & Stenton Peerage* [1875-1976] App Cas. 278 at p 279:-

My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient but all



converging and brought to bear upon the same point and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.

[28] The learned trial judge in *Idris v. PP* said:-

In other words circumstantial evidence consists of this: that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test. If it leaves gaps then it is of no use at all. As I have stated this case depends entirely upon circumstantial evidence.

[29] The Court of Appeal in the present case said:-

Where the evidence is wholly circumstantial, what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope (see *Chun Chwen Kong v. Public Prosecutor* [1962] 1 MLRA 32; [1962] 1 MLJ 307). There is insufficient evidence to connect the respondent with the killing. Circumstantial evidence should be such that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person you will find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps, then it is of no use at all. (See *Idris v. Public Prosecutor* [1960] 1 MLRA 265; [1960] 1 MLJ 296)

[30] Abdoolcader FJ in *Dato Mokhtar bin Hashim v. PP* [1983] 1 MLRA 7; [1983] 2 MLJ 232 at p 275; [1983] CLJ (Rep) 101 said:-

Where circumstantial evidence is the basis of the prosecution case the evidence proved must irresistibly point to one and only one conclusion, the guilt of the accused, but in a case tried without a jury the failure by the court to expressly state this is not fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt (*Jayaraman & Ors v. PP* [1979] 1 MLRH 215; [1979] 2 MLJ 88)

[31] The trial judge in this case must therefore view all the evidence before him and decide whether all the evidence taken together is sufficient to prove the offence against which the accused is charged.



Burden Of Proof

[32] The prosecution's gravamen is that the trial judge and the Court of Appeal had placed too heavy a burden on the prosecution at the close of its case. On 31 January 1997 s 180 of the Criminal Procedure Code was amended by requiring the prosecution to make out a *prima facie* case at the end of its case. Section 180(1), (2), (3) now reads:

180. Procedure after conclusion of case for prosecution.

- (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.
- (2) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.
- (3) If the court finds that a *prima facie* case has been made out against the accused on the offence charged the court shall call upon the accused to enter on his defence.

[33] Prior to this amendment, as a result of the decision in *Haw Tua Tau*, there had been heated discussions on the term *prima facie* in relation to burden of proof at the close of the prosecution case. After the amendment, the discussions on this subject continued culminating in *Balachandran v. PP* [2004] 2 MLRA 547; [2005] 2 MLJ 301; [2005] 1 CLJ 85; [2005] 1 AMR 321 and *PP v. Mohd Radzi Abu Bakar* [2005] 2 MLRA 590; [2005] 6 MLJ 393; [2006] 1 CLJ 457; [2005] 6 AMR 203, both Federal Court judgments. Since then, Parliament has introduced the definition of *prima facie*. That term is now defined as “where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction”. The saga of “the *prima facie* case” will continue when the curtain rises again in the near future. For now, it is not necessary to go into that subsection since it cannot apply retrospectively to our present case since it affects the substantial rights of the accused. There is nothing to indicate any intention as to its retrospective effect but even if it does, it would run foul of art 7 of the Federal Constitution (see *Dalip Bhagwan Singh v. Public Prosecutor* [1997] 1 MLRA 653; [1998] 1 MLJ 1; [1997] 4 CLJ 645 at pp 663 to 665; [1997] 4 AMR 4029) and *Public Prosecutor v. Ishak Hj Shaari & other appeals* [2003] 1 MLRA 522; [2003] 4 MLJ 585; [2003] 3 CLJ 843 at pp 851 and 852; [2003] 5 AMR 401). At this stage, I should not be expressing any views on its interpretation without the benefit of a full argument.

Conclusion

Judgment Of the Court of Appeal Upheld

[34] I have read through the judgments of the learned trial judge and the Court of Appeal and find that the trial judge had correctly examined the evidence adduced before him and had also correctly applied the principles when assessing

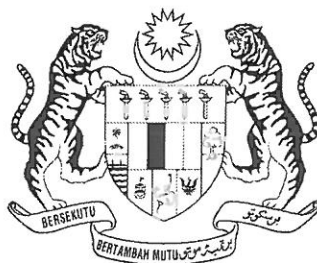


circumstantial evidence, particularly as in this case, when there is a reasonable likelihood of the existence of another person who could have committed the offence (see *R v. Abbot* [1955] 2 All ER 899 and *PP v. Muhamad Nasir Sharuddin & Anor* [1992] 2 MLRH 390; [1994] 2 MLJ 576; [1992] 3 CLJ 408).

[35] For reasons discussed above, the prosecution has not discharged its burden in this case before us. The most damning evidence against the prosecution was the presence of the man with the foul body odour in the apartment and the scientifically proven DNA of the “Unknown Male 1” recovered from the deceased’s body which remains unrebutted.

[36] The learned trial judge was right in deciding not to call for the defence at the close of the prosecution and acquitting and discharging the accused at that stage. I dismiss this appeal and affirm the decision of the learned trial judge and that of the Court of Appeal.

[37] My learned brothers Arifin bin Zakaria, Nik Hashim bin Nik Ab. Rahman, Hj Hashim bin Dato’ Hj. Yusoff and Zulkefli bin Ahmad Makinudin, FCJJ, have seen this judgment in draft and have expressed their concurrence.



LAWS OF MALAYSIA

REPRINT

Act 56

EVIDENCE ACT 1950

Incorporating all amendments up to 1 January 2006

PUBLISHED BY
THE COMMISSIONER OF LAW REVISION, MALAYSIA
UNDER THE AUTHORITY OF THE REVISION OF LAWS ACT 1968
IN COLLABORATION WITH MALAYAN LAW JOURNAL SDN BHD AND
PERCETAKAN NASIONAL MALAYSIA BHD
2006

Evidence

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Confession caused by inducement, threat or promise when irrelevant in criminal proceeding

24. A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.

Confession to police officer below the rank of Inspector not to be proved

25. (1) Subject to any express provision contained in any written law, no confession made to a police officer who is below the rank of Inspector by a person accused of any offence shall be proved as against that person.

(2) *(Deleted by Act A324).*

Confession by accused while in custody of police not to be proved against him

26. (1) Subject to any express provision contained in any written law, no confession made by any person whilst he is in the custody of a police officer, unless it is made in the immediate presence of a Sessions Court Judge or Magistrate, shall be proved as against that person.

(2) *(Deleted by Act A324).*

How much of information received from accused may be proved

27. (1) When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or

not, as relates distinctly to the fact thereby discovered may be proved.

(2) (*Deleted by Act A324*).

Confession made after removal of impression caused by inducement, threat or promise relevant

28. (1) If such a confession as is referred to in section 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the court, been fully removed, it is relevant.

(2) (*Deleted by Act A324*).

Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc.

29. (1) If such a confession as is referred to in section 24 is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make a confession and that evidence of it might be given against him.

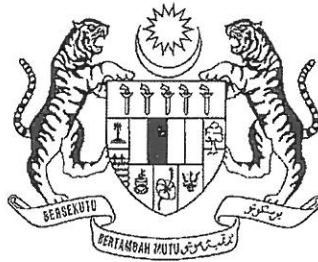
(2) (*Deleted by Act A324*).

Consideration of proved confession affecting person making it and others jointly under trial for same offence

30. (1) When more persons than one are being tried jointly for the same offence, and a confession made by one of those persons affecting himself and some other of those persons is proved, the court may take into consideration the confession as against the other person as well as against the person who makes the confession.

(2) (*Deleted by Act A324*).

Explanation— “offence” as used in this section includes the abetment of or attempt to commit the offence.



LAWS OF MALAYSIA

REPRINT

Act 593

CRIMINAL PROCEDURE CODE

As at 1 November 2012

PUBLISHED BY
THE COMMISSIONER OF LAW REVISION, MALAYSIA
UNDER THE AUTHORITY OF THE REVISION OF LAWS ACT 1968
2012

(2) If any such person refuses to attend as so required that police officer may report such refusal to a Magistrate who may thereupon in his discretion issue a warrant to secure the attendance of that person as required by such order.

(3) *(Deleted by Act A1274).*

Examination of witnesses by police

112. (1) A police officer making a police investigation under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.

(2) Such person shall be bound to answer all questions relating to the case put to him by that officer:

Provided that such person may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture.

(3) A person making a statement under this section shall be legally bound to state the truth, whether or not such statement is made wholly or partly in answer to questions.

(4) A police officer examining a person under subsection (1) shall first inform that person of the provisions of subsections (2) and (3).

(5) A statement made by any person under this section shall, whenever possible, be taken down in writing and signed by the person making it or affixed with his thumbprint as the case may be, after it has been read to him in the language in which he made it and after he has been given an opportunity to make any corrections he may wish.

Admission of statements in evidence

113. (1) Except as provided in this section, no statement made by any person to a police officer in the course of a police investigation made under this Chapter shall be used in evidence.

TAB H



LAWS OF MALAYSIA

REPRINT

Act 56

EVIDENCE ACT 1950

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2006

Evidence

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The facts that other entries made by *A* in the same book are false, and that the false entry is in each case in favour of *A* are relevant.

(*c*) *A* is accused of fraudulently delivering to *B* a counterfeit ringgit.

The question is whether the delivery of the ringgit was accidental.

The facts that soon before or soon after the delivery to *B*, *A* delivered counterfeit ringgit to *C*, *D* and *E* are relevant as showing that the delivery to *B* was not accidental.

Existence of course of business when relevant

16. When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

ILLUSTRATIONS

(*a*) The question is whether a particular letter was despatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that particular letter was put in that place, are relevant.

(*b*) The question is whether a particular letter reached *A*.

The facts that it was posted in due course and was not returned through the Dead Letter Office are relevant.

*Admissions and Confessions***Admission and confession defined**

17. (1) An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned.

(2) A confession is an admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed that offence.

(3) Subsection (2) shall have no application in Sarawak.

Bombay High Court

Pulukuri Kottaya vs King-Emperor on 19 December, 1946

Author: J Beaumont

Bench: Wright, Simonds, Uthwatt, J Beaumont

JUDGMENT John Beaumont, J.

1. This is an appeal by special leave against the judgment and order of the High Court of Judicature at Madras, dated October 22, 1945, dismissing an appeal against the judgment and order of the Court of Session, Guntur Division, dated August 2, 1945, whereby the appellants, who were accused Nos. 1 to 9, and nine others, were found guilty on charges of rioting and murder. Appellants Nos. 1, 2, 3, 4, 7 and 8 were sentenced to death, and appellants Nos. 3 and 9 were sentenced to transportation for life. There were other lesser concurrent sentences which need not be noticed. At the conclusion of the arguments their Lordships announced the advice which they would humbly tender to His Majesty, and they now give their reasons for that advice.

2. The offence charged was of a type common in many parts of India in which there are factions in a village, and the members of one faction are assaulted by members of the other faction, and, in the prosecution which results, the Crown witnesses belong to the party hostile to the accused; which involves that their evidence requires very careful scrutiny. In the present case the assessors were not prepared to accept the prosecution evidence, but the learned Sessions Judge, whilst taking careful note of the fact that the six eye-witnesses were all hostile to the accused, nevertheless considered that the story which they told was substantially true, and accordingly he convicted the accused. As already noted, this decision was upheld by the High Court in appeal.

3. The grounds upon which leave to appeal to His Majesty in Council was granted were two:-

1. The failure of the prosecution to supply the defence at the proper time with copies of statements which had been made by important prosecution witnesses during the course of the preliminary police investigation involving, it is alleged, a breach of the express provisions of Section 162 of the Code of Criminal Procedure.

2. The alleged wrongful admission and use in evidence of confessions alleged to have been made whilst in police custody by appellants Nos. 8 and 6. This point involves an important question as to the construction of Section 27 of the Indian Evidence Act upon which the opinions of High Courts in India are in conflict.

4. Their Lordships will deal first with the alleged infringement of Section 162 of the Code of Criminal Procedure. The relevant portions of that section are as follows:-

162. (1) No statement made by any person to a police-officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police-diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall, on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872. When any part of such statement is BO used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

5. The facts material upon this part of the case are these. The offence took place at about 6-30 p.m. on December 29, 1944, and at 7 a.m. on December 30, the police sub-inspector held an inquest on the body of one of the murdered men. He examined live of the prosecution witnesses, including four of the alleged six eyewitnesses, and wrote down their statements in his note-book. After the conclusion of the inquest the Circle Inspector took over the investigation from the police sub-inspector and on the same day, that is December 30, he examined all the alleged eye-witnesses and others, including all the witnesses who had been examined by the police sub-inspector, and their statements were recorded in the case diary prepared by the Circle Inspector. It is the failure to produce the note-book of the police sub-inspector which constitutes the alleged infringement of the proviso to Section 162, and the facts as to this are stated in an affidavit of Gutlapally Venkata Appayya sworn on October 19, 1945, and are not challenged. Prior to the commencement of the preliminary inquiry before the Magistrate an application was made on behalf of the accused for grant of copies of statements under Section 162 of the Code of Criminal Procedure recorded by the sub-inspector and the Circle Inspector of Police from the prosecution witnesses in the case during investigation. The accused were supplied with copies of statements made by witnesses before the Circle Inspector of Police and were informed that statements made to the Sub-inspector of Police were not available. During the Sessions trial, when prosecution witness No. 2, who was the principal prosecution witness, was in the witness-box, counsel for the accused represented to the Court that he had not been supplied with copies of statements recorded by the sub-inspector at the first inquest, and requested the Court to make those statements available to enable him to cross-examine the important prosecution witnesses with reference to the earliest statements. The learned Sessions Judge directed the public prosecutor to comply with the request. The public prosecutor, after consulting the sub-inspector and Circle Inspector, who were present in Court, submitted to the Court that except what was recorded in the inquest report itself, no other statements were recorded by the sub-inspector, and the learned Judge directed the defence counsel to proceed. The next day, when the cross-examination of prosecution witness 2 was continued, counsel for the accused submitted to the Court that he desired to file an application for copies of statements recorded by the sub-inspector at the first inquest so that it might be endorsed by the prosecution that no such record of statements existed. Then the public prosecutor stated to the Court that he fully realized his responsibility in making the statements he had made on the previous day, but there was no record of any statement made at the inquest available. On the fourth day of the trial, after the principal prosecution witnesses had been discharged, the police sub-inspector gave evidence, and he then produced in the witness-box his notebook containing the statements of the five witnesses he had examined at the inquest, and a copy of such statements was then supplied to the accused. There are some discrepancies between the statements made to the police sub-inspector and the statements of the witnesses in the witness-box, but it is not suggested that such discrepancies are of a vital nature.

6. It is clear from the facts narrated above that there was a breach of the proviso to Section 162 of the Code of Criminal Procedure, and that the entries in the police sub-inspector's note-book were not made available to the accused, as they should have been, for the cross-examination of the witnesses for the Crown. The right given to an accused person by this section is a very valuable one and often provides important material for cross-examination of the prosecution witnesses. However slender the material for cross-examination may seem to be, it is difficult to gauge its possible effect. Minor inconsistencies in his several statements may not embarrass a truthful witness, but may cause an untruthful witness to prevaricate, and may lead to the ultimate break-down of the whole of his evidence; and in the present case it has to be remembered that the accused's contention was that the prosecution witnesses were false witnesses. Courts in India have always regarded any breach of the proviso to Section 162 as matter of gravity. *Baliram Tikaram v. Emperor* [1945] A.I.R. Nag. 1 where the record of statements made by witnesses had been destroyed, and *Emperor v. Bansidhar* (1930) I.L.R. 53 All. 458 where the Court had refused to supply to the accused copies of statements made by witnesses to the police, afford instances in which failure to comply with the provisions of Section 162 have led to the convictions being quashed. Their Lordships would, however, observe that where, as in those two cases, the statements were never made available to the accused, an inference, which is almost irresistible, arises of prejudice to the accused. In the present case, the statements of the witnesses were made available though too late to be effective, and their contents are known. This by itself might not be decisive, but, as already noted, the Circle Inspector re-examined the witnesses whom the police sub-inspector had examined, and did so on the same day. The notes of the examination by the Circle Inspector were made available to the accused at the earliest opportunity, and when the note-book of the police sub-inspector was produced towards the end of the prosecution case, counsel for the accused was in a position to ascertain whether there was any inconsistency between the statements made to the police sub-inspector and those made later in the day to the Circle Inspector. If any such inconsistency had been discovered, this would have been a strong point for the accused in their appeal, but no such point was taken; indeed, the only complaint upon this subject in the High Court was that the police sub-inspector ought to be presumed to have prepared a case diary which he was suppressing. The High Court rejected this contention, rightly as their Lordships think. Nor has any such point been taken before this Board, and the entries from the Circle Inspector's diary are not on record. In the result, their Lordships are satisfied that, in the peculiar circumstances of this case, no prejudice was occasioned to the accused by the failure to produce in proper time the notebook of the police sub-inspector.

7. Even on this basis, Mr. Pritt for the accused has argued that a breach of a direct and important provision of the Code of Criminal Procedure cannot be cured, but must lead to the quashing of the conviction. The Crown, on the other hand, contends that the failure to produce the note-book in question amounted merely to an irregularity in the proceedings which can be cured under the provisions of Section 537 of the Code of Criminal Procedure if the Court is satisfied that such irregularity has not in fact occasioned any failure of justice. There are, no doubt, authorities in India which lend some support to Mr. Pritt's contention, and reference may be made to *Tirkha v. Nanak* (1927) I.L.R. 49 All. 475 in which the Court expressed the view that Section 537 of the Code of Criminal Procedure applied only to errors of procedure arising out of mere inadvertence, and not to cases of disregard of, or disobedience to, mandatory provisions of the Code, and to *In re Madura Muthu Vannian* (1922) I.L.R. 45 Mad. 820 in which the view was expressed that any failure to

examine the accused under Section 342 of the Code of Criminal Procedure was fatal to the validity of the trial and could not be cured under Section 537. In their Lordships' opinion this argument is based on too narrow a view of the operation of Section 537. When a trial is conducted in a manner different from that prescribed by the Code (as in *N.A. Subramania Iyer v. King-Emperor* (1901) L.R. 28 I.A. 257, s.c. 3 Bom. L.R. 540), the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under Section 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind. This view finds support in the decision of their Lordships' Board in *Abdul Rahman v. The King-Emperor* (1926) I.L.R. 5 Ran. 53, s.c. 29 Bom. L.R. 813, P.C. where failure to comply with Section 360 of the Code of Criminal Procedure was held to be cured by Sections 535 and 537. The present case falls under Section 537, and their Lordships hold the trial valid notwithstanding the breach of Section 162.

8. The second question, which involves the construction of Section 27 of the Indian Evidence Act, will now be considered. That section and the two preceding sections, with which it must be read, are in these terms:-

25. No confession made to a Police officer shall be proved as against a person accused of any offence.

26. No confession made by any person whilst he is in the custody of a Police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

The explanation to the section is not relevant.

27. Provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a Police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

9. Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is

accused. Mr. Megaw, for the Crown, has argued that in such a case the "fact discovered" is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of Section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to Section 26, added by Section 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge; and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A", these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

10. High Courts in India have generally taken the view as to the meaning of Section 27 which appeals to their Lordships, and reference may be made particularly to *Sukhan v. The Crown* (1929) I.L.R. 10 Lah. 283, F.B. and *Ganu Chandra v. Emperor* (1931) I.L.R. 56 Bom. 172, s.c. 34 Bom. L.R. 303 on which the appellants rely, and with which their Lordships are in agreement. A contrary view has, however, been taken by the Madras High Court, and the question was discussed at length in a Full Bench decision of that Court, *Athappa Goundan, In re*, [1937] Mad. 695, F.B. where the cases were referred to. The Court, whilst admitting that the weight of Indian authority was against them, nevertheless took the view that any information which served to connect the object discovered with the offence charged was admissible under Section 27. In that case the Court had to deal with a confession of murder made by a person in police custody, and the Court admitted the confession because in the last sentence (readily separable from the rest) there was an offer to produce two bottles, a rope, and a cloth gag, which, according to the confession, had been used in, or were connected with, the commission of the murder, and the objects were in fact produced. The Court was impressed with the consideration that as the objects produced were not in themselves of an incriminating nature their production would be irrelevant unless they were shown to be connected with the murder, and there was no evidence so to connect them apart from the confession. Their Lordships are unable to accept this reasoning. The difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact can afford no justification for reading into Section 27 something which is not there, and admitting in evidence a confession barred

by Section 26. Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law.

11. In their Lordships' opinion Athappa Goundar's case was wrongly decided, and it no doubt influenced the decision now under appeal.

12. The statements to which exception is taken in this case are first a statement by accused No. 6 which he made to the police sub-inspector and which was reduced into writing, and is Exhibit "P." It is in these terms:-

The mediatorsnama written at 9 a.m. on 12th January, 1945, in front of Maddineni Verrayya's choultry and in the presence of the undersigned mediator.

Statement made by the accused Inala Sydayya on being arrested. About 14 days ago, I Kotayya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank. We, all beat Boddupati China Sivayya and Subayya, to death. The remaining persons, Pullayya, Kotayya and Narayana ran away. Dondapati Ramayya who was in our party received blows on his hands. He had a spear in his hands. He gave it to me then. I hid it and my stick in the rick of Venkatanarasu in the village. I will show if you come. We did all this at the instigation of Pulukuri Kotayya.

12th January, 1945. (Signed) POTLA CHINA MATTAYYA.

(") KOTTA KRISHNAYYA.

(Sgd.) G. BAPAI AH, Sub-Inspector of Police.

13. The whole of that statement except the passage "I hid it (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come" is inadmissible. In the evidence of the witness Potla China Mattayya proving the document the statement that accused 6 said "I Mattayya and others went to the corner of the tank-land. We killed Sivayya and Subayya" must be omitted.

14. A confession of accused 3 was deposed to by the police sub-inspector, who said that accused 3 said to him:-

I stabbed Sivayya with a spear, I hid the spear in a yard in my village. I will show you the place.

The first sentence must be omitted. This was followed by a Mediatorsnama, Exhibit Q. 1, which is unobjectionable except for a sentence in the middle, He said that it was with that spear that he had stabbed Boddapati Sivayya," which must be omitted.

15. The position therefore is that in this case evidence has been admitted which ought not to have been admitted, and the duty of the Court in such circumstances is stated in Section 167 of the Indian Evidence Act which provides:

The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

16. It was therefore the duty of the High Court in appeal to apply its mind to the question whether, after discarding the evidence improperly admitted, there was left sufficient to justify the convictions. The Judges of the High Court did not apply their minds to this question because they considered that the evidence was properly admitted, and their Lordships propose therefore to remit the case to the High Court of Madras, with directions to consider this question. If the Court is satisfied that there is sufficient admissible evidence to justify the convictions, they will uphold them. If, on the other hand, they consider that the admissible evidence is not sufficient to justify the convictions, they will take such course, whether by discharging the accused or by ordering a new trial, as may be open to them.

17. Their Lordships have, therefore, humbly advised His Majesty that this appeal be allowed and that the case be remitted to the High Court of Madras, with directions to consider whether the evidence on record apart from the confessional statements of accused No. 3 and accused No. 6 which their Lordships have held to be inadmissible, is sufficient to justify the convictions and to make such order in the matter as may be right having regard to their decision upon the question remitted to them.

PP
v.
LEE KIM SENG

High Court Sabah & Sarawak, Miri
Stephen Chung J
[Criminal Trial No: 45-1-2011-(MR)]
29 June 2012

Case(s) referred to:

Ahmad Najib Aris v. PP [2009] 1 MLRA 58; [2009] 2 MLJ 613; [2009] 2 CLJ 800 (refd)
Amathevelli P Ramasamy v. PP [2009] 1 MLRA 153; [2009] 2 MLJ 367; [2009] 3 CLJ 109 (refd)
Anandagoda v. Regina [1962] 1 MLRA 112; [1962] 1 MLJ 289 (refd)
Chan Chwen Kong v. PP [1962] 1 MLRA 32; [1962] 1 MLJ 307 (refd)
Chong Soon Koy v. PP [1977] 1 MLRA 213; [1977] 2 MLJ 78 (refd)
Dato' Mokhtar Hashim & Anor v. PP [1983] 1 MLRA 7; [1983] 2 MLJ 232; [1983] CLJ (Rep) 101 (refd)
Goi Ching Ang v. PP [1999] 1 MLRA 26; [1999] 1 MLJ 507; [1999] 1 CLJ 829 (refd)
Hasamuddin Talena v. PP [2002] 1 MLRA 113; [2002] 2 MLJ 408; [2002] 2 CLJ 504 (refd)
Idris v. PP [1960] 1 MLRA 265; [1960] 1 MLJ 296 (refd)
Krishna Rao Gurumurthi v. PP and Another Appeal [2009] 1 MLRA 23; [2009] 3 MLJ 643; [2009] 2 CLJ 603 (refd)
Krishnan Ramar v. PP [1986] 1 MLRA 239; [1987] 1 CLJ 28; [1987] CLJ (Rep) 145 (refd)
Liew Kon Kiow (f) v. PP [1949] 1 MLRA 349; [1948-1949] supp MLJ 150 (refd)
Lim Hean Chong v. PP [2012] 3 MLRA 567; [2012] 1 MLJ 149; [2012] 2 CLJ 1046 (refd)
Looi Kow Chai & Anor v. PP [2002] 2 MLRA 383; [2003] 1 CLJ 734 (refd)
Pang Chee Meng v. PP [1991] 1 MLRA 608; [1992] 1 MLJ 137; [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 (refd)
PP v. Basri Salihin [1992] 3 MLRH 342; [1994] 2 MLJ 476; [1993] 1 CLJ 420 (refd)
PP v. Kang Ho Soh [1991] 2 MLRH 216; [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557 (refd)
PP v. Rosyatimah Neza & Anor [1988] 2 MLRH 121; [1989] 1 MLJ 360; [1989] 1 CLJ 481; [1989] 2 CLJ (Rep) 364 (refd)
Sulaiman Hamat v. PP [2012] 2 MLRA 185; [2012] 4 MLJ 514; [2013] 3 CLJ 1027; [2012] 3 AMR 456 (refd)
Sum Kum Seng v. PP [1980] 1 MLRA 746; [1981] 1 MLJ 244 (refd)
The King v. Cooray [1926] 28 NLR 74 (refd)
The Queen v. Murugan Ramasamy [1965] AC 1 (refd)
Wai Chan Leong v. PP [1989] 1 MLRA 109; [1989] 3 MLJ 356; [1989] 2 CLJ



1168; [1989] 1 CLJ (Rep) 171 (refd)

Legislation referred to:

Criminal Procedure Code, ss. 112, 113(1), (4)

Evidence Act 1950, ss 3, 17(1), (2), (3), 24, 25, 26, 27, 32(1)(a), (i), (j), 90A

Penal Code, s 302

Counsel:

*For the prosecution - Mahadhir Mohd Khairudin (Mohd Syakil Zulkifli with him);
DPPs*

*For the accused - Ranbir Singh (Arthur Lee with him); M/s Ranbir S Sangha
Advocates*

[Acquitting and discharging accuse.]

JUDGMENT

Stephen Chung J:

[1] The accused was charged under s 302 of the Penal Code as follows:

Bahawa kamu, pada 24.3.2011 di antara jam lebih kurang 2 petang hingga 5 petang di Jalan Kpg. Beraya Lama, di dalam Daerah Miri, di dalam Negeri Sarawak, telah melakukan pembunuhan dengan menyebabkan kematian Tiffany Wong Ye Hui (P) No. (KPT: 930518-13-6086) dan dengan yang demikian telah melakukan suatu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan.

[2] The duty of a judge sitting alone, at the close of the case for the prosecution, is to determine, as a trier of fact, whether the prosecution has made out a *prima facie* case against the accused. He must subject the evidence of the prosecution to a maximum evaluation: *Looi Kow Chai & Anor v. PP* [2002] 2 MLRA 383; [2003] 1 CLJ 734.

[3] According to the post mortem report, the cause of death was manual strangulation of the deceased. The prosecution in its opening statement submitted that it would rely on medical and circumstantial evidence and on s 27 of the Evidence Act to prove that it was the accused who caused the death of the deceased. The burden was on the prosecution to prove that the deceased died on 24 March 2011 and that she died as a result of being strangled to death by the accused.

[4] PW2, the mother of the deceased, testified that on 24 March 2011 at about 11am someone came to pick up the deceased. She said the deceased left the house with this person in a grey colour motor vehicle which she thought was a grey Proton Waja. She could not see the driver and she did not know who came to pick up the deceased. She said she told the deceased to come home early and that she telephoned the deceased many times from 5pm onwards but the deceased did not answer her calls.



[5] When the deceased did not come home late that night and still did not answer her calls, she became worried. She talked to her husband (PW4) and one of her sons (PW9). She said her sons called the deceased's friends via their mobile phones and facebook accounts to find out where she was and they also went out looking for her around the city but could not find her. PW2 said the deceased did not come home that night. She said that early the next morning PW4 and PW9 went to lodge a police report but the police advised them that a person must be missing for at least 24 hours before a missing person report could be lodged.

[6] PW4 testified that the deceased used the DIGI network for her mobile phone and that through their contacts in DIGI they were able to find out that the deceased had called or talked to two persons the night before. They made enquiries with the deceased's friends and found out that one of the persons whom the deceased talked to via her mobile phone was the deceased's boyfriend (PW5) and that the other person was called Lee Kim Seng ie, the accused. PW4 said that they found out from the deceased's friends that the accused father owned a goldsmith shop and they went to the shop but it was not opened. Then they went to the accused's house but nobody opened the gate when they pressed the doorbell and sounded their car horn.

[7] PW4 said that he and his son went back to the police station to seek help. They met two politicians, Dato Sebastian Ting and Mr Andy Chia, who happened to be at the police station and who tried to help by getting the police to assist them as soon as possible. PW4 said that the officer who was to see them was not available and they waited at the police station. He said that at about noon he saw the accused and his parents were also at the police station. They were with an Inspector Chong in a room. The door was not closed but they were prevented from going into the room. He did not know why they were there. He said that they were asked to wait in another room used by another officer. He said that Dato Sebastian Ting then told him that something bad had happened to his daughter but he was not told what exactly had happened to her daughter. He said he assumed the worst had happened.

[8] He said that at about 2pm he saw the police and the accused left the police station presumably to go to the scene. They followed the police party to the scene where he saw a body lying in a drain and he knew it was her daughter. PW4 identified the deceased as his daughter at the post mortem at the hospital. He and his wife also identified the deceased as their daughter from photographs shown to them in court during the trial.

[9] The post mortem, which was carried out on 27 March 2011 at 12.30am, was performed by Dr Siew Sheue Feng (PW12), a forensic pathologist from the Department of Forensic Medicine, Kuala Lumpur Hospital. After the post mortem he prepared a report which was tendered as exh. P63.

[10] PW12 said that the deceased sustained external and internal injuries which resulted in her death. The external injuries included a group of four injuries on the neck comprising of (a) a bruise, 6 x 3cm just beneath the left



angle of mandible, (b) a bruise, 4.2 x 4cm on the left lateral aspect of the neck, (c) a group of 4 obliquely arranged abraded bruises measuring 1.2 x 0.4cm, 1 x 0.6cm, 2 x 0.5cm and 0.8 x 0.5cm respectively on the front of the neck, below the thyroid cartilage, and (d) an abrasion, 5 x 1cm on the root of the right front of the neck. The corresponding internal injuries included a subcutaneous contusion 7 x 5cm on the front of the neck, above the suprasternal notch, contusion of the left sternothyroid and contusion of the left thyrohyoid muscle, membrane and left lateral thyrohyoid ligament and haemorrhage was noted on the front of the right half of the epiglottis. He said that there was no evidence of sexual assault on the deceased.

[11] PW12 said the injuries were consistent with those due to manual strangulation. He was asked and he said he was not able to determine whether the deceased was strangled inside a motor vehicle, in particular whether she was strangled inside a Toyota Vios motor vehicle which was usually used by the accused and shown in the photographs in exh. P3. He was also not able to come to a finding on the time of death of the deceased.

[12] PW5 was the deceased's boyfriend. He testified that on 24 March 2011 at 3pm he just came back from school. Then he saw an sms message from the deceased that the deceased had gone out with the accused to meet her friend Lee Yunn Mei at Boulevard to pick up her examination results from Lee Yunn Mei. He replied to her message that it was okay for her to go and the deceased replied 'okay'. That was the last time he heard from her. PW5 called the deceased after 6pm but she did not answer. He called again after 9pm and again she did not answer. He went out looking for her later but did not find her.

[13] There was no eyewitness or any direct evidence to establish that it was the accused who strangled the deceased to death. The prosecution relied on the following evidence to establish that it was the accused who was responsible for the death of the deceased:

(a) The admissions by the father (PW15) of the accused who purportedly told the police what the accused had said to him that the accused might have killed a female.

(b) The evidence of PW13, the police officer who interviewed the accused at the police station on 25 March 2011 and whom PW4 had referred to as Inspector Chong, who testified that the accused during the interview had confessed to him that the accused had murdered a lady unintentionally and that the accused could show the police the place where it happened.

(c) The evidence of PW14, the police officer, who together with PW13 and other police officers, were led by the accused to a drain at Bakam where the deceased's body was found and who testified that the accused had told him that the accused had thrown the body at the site.

(d) The evidence of PW11, the police officer who examined and



analysed four mobile phones which were seized from the accused, from PW5 and from a Kuan Hui Chin. PW11 extracted the sms messages from the mobile phones which PW17 said showed the motive of the accused to kill the deceased.

The defence objected to the admissibility of the above evidence. I shall deal with each of the above evidence, the objections to their admissibility and on their admissibility or otherwise.

[14] What is circumstantial evidence? It consists of this: that when you look at all the surrounding circumstances, you find a series of undesigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps then it is of no use at all: *Idris v. PP* [1960] 1 MLRA 265; [1960] 1 MLJ 296. Where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. Is that rope strong enough to hand the accused: *Chan Chwen Kong v. PP* [1962] 1 MLRA 32; [1962] 1 MLJ 307. Where circumstantial evidence is the basis of the prosecution's case the evidence proved must irresistibly point to one and only one conclusion, the guilt of the accused: *Dato' Mokhtar Hashim & Anor v. PP* [1983] 1 MLRA 7; [1983] 2 MLJ 232; [1983] CLJ (Rep) 101.

[15] PW17, the investigation officer of the case, testified that on 25 March 2011, at about 11.30am, when he was in Kuching, he received a telephone call from a male person by the name of Lee Ket Chung (PW15). He said that PW15 informed him that his son had a problem, a high possibility that he might have killed a female person. PW17 told PW15 that he was in Kuching and he told PW15 to see PW13 or PW14 for further action to be taken. He said that he immediately informed his superior DSP Nixon of the conversation with PW15 and he also informed PW13 and PW14 that PW15 would contact them.

[16] He said that he subsequently telephoned PW13 and PW14 to find out whether PW15 had contacted them and PW13 told him that PW15 and the accused were in the police station. He said that after he arrived in Miri he telephoned PW14 who told him that they ie, the police party and the accused were in Kampung Beraya Lama and he went to the place. When he arrived at the place, he met PW14 and PW13 who briefed him on what had happened and he saw a person whom he suspected was the accused. After that he saw a body in a drain. He found out that it was a female.

[17] PW13 testified that on 25 March 2011 at about 2pm, the accused was brought by his father (PW15) to see him. He said PW15 informed him that the accused had committed a big offence and that the accused probably had committed a murder to a girl. PW13 said that PW15 asked him to take action and he interviewed the accused. He said the accused told him that the accused had murdered a lady unintentionally and that the accused could show the place where it happened. He said the accused told him that the accused did not



know the name of the place but the accused could show him where the place was.

[18] He said the accused led him together with PW14 and other police officers to the scene which was about 1km, via a small road of Kpg Beraya Lama, from the main road of Bakam. He said that upon arrival they did not see the body because the place was bushy with long grass. He said that after the accused was taken out of the police vehicle, the accused showed them a drain which was covered with long grass where they found the body. The body was facing down in the drain. The body was covered with a little bit of water. The head of the body was covered and wrapped in a black plastic bag which was tied at the neck. PW13 said that the accused told him it was the body of the girl that had been thrown there. PW13 said that it was PW14 who untied and removed the black plastic bag which covered the head of the body. PW13 subsequently made a police report in connection with the interview and the information which he received from the accused. The police report was tendered as exh. P65.

[19] PW14 said that on 25 March 2011 at about 11am he was informed by PW13 that a male person had gone to the police station and made a confession that he had killed a female which was thrown at a place called Bakam, Miri. After that, he met PW13 in the office and this male person whom he identified as the accused was already in the office with PW13 and Lance Corporal Andrew. He said PW13 again told him about the interview with the accused.

[20] PW14 said that he again asked the accused whether it was true that the accused had killed a female and whether the accused could bring the police to show the location where the body was thrown. PW14 said that the accused told him the accused did not know the specific location but the accused could show the police where the location was. PW14 said that he then instructed L/Cpl Andrew to call other police personnel to be on standby to go to the location.

[21] PW15 denied having told PW17 in their telephone conversation that the accused had told PW15 that the accused might have caused the death of a female. PW15 similarly denied having told PW13 at the police station that the accused had told PW15 that the accused might have caused the death of a lady. In respect of the conversation or admission made by PW15 to PW17, PW17 said that immediately after his telephone conversation with PW15 on 25 March 2011 he informed his superior about the conversation. The evidence showed that PW17 did not write down or record the contents of this conversation with PW15. He also did not record the conversation in his diary or in the investigation diary in the case. The prosecution did not call the superior officer to whom PW17 had reported the telephone conversation to testify and corroborate PW17 on the contents of the conversation.

[22] Similarly PW13 did not record the conversation about what PW15 had purportedly told him at the police station that the accused might have caused the death of a lady and requested him to take action. It is easy to make such an allegation and it is just as easy to deny having made such an admission.



[23] However, PW17 had recorded a statement from PW15 under s 112 Criminal Procedure Code (CPC) which purportedly included what the accused had told PW15 regarding the death of the deceased. PW15 in fact admitted that he had given a statement to PW17. PW15 in his evidence however denied having told PW17 during their telephone conversation and during the recording of his statement that the accused had told him that the accused might have caused the death of the deceased. PW15 said that he could not read and write Bahasa Malaysia, he could only speak and understand simple pasar Malay. He said that during the recording of the statement PW17 spoke to him in Mandarin. He said that the statement which was recorded in Bahasa Malaysia was not shown or read back to him.

[24] Although this statement was shown to PW15, for him to refresh his memory, when PW15 denied having made the admission to PW13, it was not put to him that he had made the admissions to PW17 and or to PW13 in the statement. The statement was not tendered as an exhibit to prove the admissions made by PW15 to PW17 or to PW13 nor to contradict his denials. It was also not used to impeach his credibility as a prosecution witness on what he had told PW13 and PW17.

[25] No doubt PW15 is the father of the accused and he had every reason to try to protect his son. However, he had denied making the admissions to PW13 and or PW17, both of whom did not immediately record what PW15 had purportedly told them, and the prosecution chose not to tender his recorded statement to contradict him nor to impeach him during the prosecution's case. PW15 was testifying as a prosecution witness and what he had said in his evidence had contradicted the evidence of PW13 and PW17 on these allegations. Any benefits of the doubts must be given to the accused person.

[26] It was only at the end of the prosecution's case that the learned DPP applied to recall PW15 in order to impeach his credibility, not on the fact that he had made the purported admissions to PW17 and PW13, but that he had in fact made a police report (exh. P71) to PW16 which he had denied when asked about it during the trial. In the police report, PW15 say that his son might have committed a major offence involving a female. The report did not say that the accused had killed a female or the deceased. PW15 had subsequently denied making any such admission.

[27] The prosecution's application to recall PW15 for that purpose was disallowed because it was not put to PW15, when he was in the witness stand, that he had in fact made the police report to PW16. The police report was also never shown to PW15 when he denied making the police report while he was in the witness stand. PW16 was called as a witness to testify that PW15 had made the police report at the police station which report was recorded by him.

[28] The prosecution could submit on the credibility of PW15 by referring to the police report which had been tendered as an exhibit without the necessity of having to recall him just to impeach him as a witness on whether he made



the police report or otherwise. That could not detract from the fact that PW15 had denied making the said admissions to PW17 and PW13. Although PW15's credibility was questionable the prosecution had not proven that he had made the admissions.

[29] Next, did the accused tell PW13 that he had murdered a lady unintentionally, that he could show the police the place where it happened and whether this amounted to a confession or an admission and whether it was admissible in evidence against the accused.

[30] The evidence showed that after PW15 had telephoned PW17 who asked him to contact either PW13 or PW14, PW15 and his wife had brought the accused to the police station to see PW13. PW13 after talking to PW15 had brought the accused to a room while he asked his parents to wait outside. PW13 had called for L/Cpl Andrew to be present in the room during his interview with the accused. PW13 had testified that during the interview the accused had told him that the accused might have murdered a lady unintentionally and that the accused could show the police where it happened.

[31] At that juncture, the learned defence counsel had objected to the admissibility of the above admission or confession on the basis that no caution was administered to the accused. The learned DPP replied that the prosecution did not wish to admit or use the admission or confession under s 112 CPC but under s 27 of the Evidence Act (EA). He then applied for a short stand down to discuss the matter with the other DPP who assisted him in the trial. After the short stand down, the prosecution informed the court that it did not intend to rely on the admission or confession made by the accused to PW13 that he 'had murdered a lady unintentionally' and informed the court that the same was not admissible as evidence. The prosecution submitted that it would rely on evidence which led to the discovery of the body under s 27 EA.

[32] The prosecution had also agreed to delete the sentence 'saya telah bunuh satu perempuan secara tidak sengaja' from the police report P65 made by PW13. On the objection by the defence, the court had also deleted and held as not admissible under s 27 EA the sentence in the police report 'Itu perempuan saya buang di dalam parit di Bakam.' The court ruled that the sentence in the report 'saya boleh tunjuk mana itu tempat' was admissible under s 27 EA.

[33] Similarly, the defence submitted that what the accused had purportedly said to PW14 was inadmissible because the accused was in police custody and in effect under arrest and that no caution was administered to him before or during the interview. It was submitted that what the accused had purportedly said to PW14 was a confession and could not be used against him pursuant to s 113 CPC.

[34] On the other hand, the prosecution submitted that the accused was not under arrest during the interview but was voluntarily brought to the police station by his parents. It was submitted that the accused was only arrested after he had led the police to the place where the body of the deceased was discovered. The prosecution submitted that what the accused had said to



PW13 and or to PW14 were admissible pursuant to s 17 EA.

[35]Section 17 reads as follows:

(a) An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned.

(b) A confession is an admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed that offence.

(c) Subsection (2) shall have no application in Sarawak.

[36] In *Anandagoda v. Regina* [1962] 1 MLRA 112; [1962] 1 MLJ 289, the Privy Council accepted as correct the view taken by Garvin ACJ in *The King v. Cooray* [1926] 28 NLR 74 in explaining what amounted to a confession under s 17 as follows: "The term 'admission' is the genus of which 'confession' is the species. It is not every statement which suggests any inference as to any fact in issue or relevant fact which is a confession, but only a statement made by a person accused of an offence whereby he states that he committed that offence or which suggests not any inference but the inference that he committed that offence." The Privy Council held that the test whether a statement is a confession is an objective one, whether to the mind of a reasonable person reading the statement at the time and in the circumstance in which it was made it can be said to amount to a statement that the accused committed the offence or which suggested the inference that he committed the offence. The statement must be looked at as a whole and it must be considered on its own terms without reference to extrinsic facts.

[37] This judgment must be read in the light of the comments made in *Liew Kon Kiow (f) v. PP* [1949] 1 MLRA 349; [1948-1949] supp MLJ 150 regarding English, Indian or for that matter Ceylon (as it was then called) authorities on s 17 EA. In that case, the Court of Appeal said that it is quite clear from the words "or suggesting the inference" that something short of a full admission of guilt by the accused may yet be a "confession" within the definition of s 17(2). In that case, it was held that the statement given by the accused to the police was a confession and being made while he was in the custody of the police, it was inadmissible in evidence.

[38]Section 17(3) provides that sub-s. (2) shall have no application in Sarawak. This means that only s 17(1) EA applies in Sarawak and that the distinction between an admission and a confession as explained in *Anandagoda v. Regina* shall not apply in Sarawak. Therefore, an oral statement made by a person as to any fact in issue may be admissible in evidence. Whether it is admissible will depend on the facts and circumstances of the particular case. As provided for in s 17(1), the words "made by any of the persons and under the circumstances hereinafter mentioned" require that it should be read together with the other sections subsequent to s 17, in particular the provisions of s 24, s



25 and s 26 in a criminal trial.

[39] The question whether the accused was at the material time under arrest is a question of fact. A person is under arrest if he is being watched or guarded or restrained to prevent his escape or if he is not at liberty to leave the room in the police station where he is being interviewed: see *PP v. Rosyatimah Neza & Anor* [1988] 2 MLRH 121; [1989] 1 MLJ 360; [1989] 1 CLJ 481; [1989] 2 CLJ (Rep) 364, *PP v. Kang Ho Soh* [1991] 2 MLRH 216; [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557.

[40] The evidence showed that the accused was handcuffed when he was brought from the room by PW13 and PW14 to the police vehicles in order to go to Kg Beraya Lama to find the body of the deceased. PW14 said that the accused's hands were handcuffed in front of him when he was taken from the room to the police vehicle. He said that when the accused was placed under arrest at Kg Beraya Lama, his hands were then handcuffed behind him. The defence disputed this fact and tendered a copy of the Sin Chew Daily newspaper (exh. D1) showing a photograph taken at the place where the body of the deceased was recovered. The photograph showed that the hands of the accused were handcuffed behind his back. Be that as it may, there was no caption or any report in the newspaper to indicate the precise time that it was taken and whether the photograph was taken before or after his arrest at the scene.

[41] However, PW15 had testified that when the accused was brought from the room to the police vehicle by a group of police, the accused's hands were handcuffed behind him and the accused had shouted out to PW15 that PW13 had threatened to use electric shock against the accused during the interview. As stated earlier, PW15 testified as a prosecution witness and what he had said had contradicted the testimony of PW13 and PW14. The prosecution chose not to call L/Cpl Andrew, who was present in the room with PW13 during the interview and who was in the police party to go to Bakam to either corroborate PW13 and PW14 or contradict PW15. In any event, PW9 had testified that the accused hands were handcuffed behind his back when he was brought from the room to the police vehicles.

[42] From the above facts and circumstances, it was obvious that the accused was already in police custody notwithstanding that he was brought to the police station by his parents. The accused was, from the moment he was brought inside the room to be interviewed by PW13 in the presence of L/Cpl Andrew and after his parents were asked to leave the room, no longer at liberty to leave or do what he liked bearing in mind that the parents of the deceased had already told the police that their daughter was missing and PW13 had said that PW15 had purportedly told him that the accused might have caused the death of a female. The accused was in effect under arrest or under constructive arrest during the interview.

[43] The evidence showed that no caution was administered to the accused by PW13, and by PW14 subsequently, before or during the interviews at the police station. Therefore what the accused had said to PW13 during the



interview that he had murdered a lady unintentionally and that he could show the police the place where it happened were not admissible in evidence: see *Krishnan Ramar v. PP* [1986] 1 MLRA 239; [1987] 1 CLJ 28; [1987] CLJ (Rep) 145, *PP v. Rosyatimah Neza & Anor (supra)*. Further, s 113(1) of the CPC, as amended, states that except as provided in the section, no statement made by any person to a police officer in the course of a police investigation (made under this chapter of the CPC) shall be used in evidence.

[44] Therefore, the testimony of PW14 on what PW13 had told him that the accused had admitted to PW13 that the accused had murdered a lady unintentionally and could show the police the place where it happened was similarly inadmissible.

[45] The next question is whether what the accused had said to PW14 that he could show the police the place where he had thrown the body of the deceased was admissible in evidence. The prosecution submitted that it was admissible under s 27 EA whereas the defence submitted that it was not admissible. It was submitted that what the accused had said to PW14 was information obtained in the course of police investigation while the accused was in police custody and no caution was administered to him. It was also submitted that PW14 did not record what the accused had said to him and the same was not admissible.

[46] Section 27 EA reads as follows:

When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

[47] The Federal Court in *Sum Kum Seng v. PP* [1980] 1 MLRA 746; [1981] 1 MLJ 244 explained s. 27 vis-a-vis ss. 24, 25 and 26 by adopting a passage from the judgment of the Privy Council in *The Queen v. Murugan Ramasamy* [1965] AC 1 which reads:

There can be no doubt as to what is the general purpose of sections 25 and 26. It is to recognize the dangers of giving credence to self-incriminating statements made to policemen or made while in police custody, not necessarily because of suspicion that improper pressure may have been brought to bear for the purpose of securing convictions. Police authority itself, however carefully controlled, carries a menace to those brought suddenly under its shadow; and those two sections recognize and provide against the danger of such persons making incriminating confessions with the intention of placating authority and without regard to the truth of what they are saying.

Section 27, on the contrary, envisages a situation in which circumstances themselves vouch for the truth of certain statements made by an accused person, even though they are made in conditions



that would otherwise justify suspicion. These are those statements that have led to the actual discovery of a proven fact when the information supplied by the accused has been the cause of the discovery.

[48] It was decided in another Federal Court decision that the Malaysian courts had persistently held to the effect that s 27 was not subject to s 24 of the Evidence Act. Once the information was proved to be within the province of s 27, the trial court would admit it in evidence notwithstanding that the information might not be given voluntarily. It went on to say that any departure from the entrenched judicial interpretation laid down in the long line of decisions should be left to the legislature: *Goi Ching Ang v. PP* [1999] 1 MLRA 26; [1999] 1 MLJ 507; [1999] 1 CLJ 829.

[49] Further, s 113(4) of the CPC as amended provides that nothing in that section shall be deemed to apply to any statement made in the course of an identification parade or falling within s 27 or ss. 32(1)(a), (i) and (j) of the Evidence Act.

[50] On the above authorities, an information obtained under s 27 EA is admissible notwithstanding that it may not be given voluntarily. However, it is not the end of the matter. The courts on the facts and circumstances of the particular case have the discretion in the interest of justice and in fairness to exclude such information: see *Goi Ching Ang v. PP (supra)*, *Krishna Rao Gurumurthi v. PP and Another Appeal* [2009] 1 MLRA 23; [2009] 3 MLJ 643; [2009] 2 CLJ 603.

[51] Must the information obtained be recorded? Learned defence counsel referred to the case of *Hasamuddin Talena v. PP* [2002] 1 MLRA 113; [2002] 2 MLJ 408; [2002] 2 CLJ 504 which held that the information must be exact and recorded in the language or words used by the accused and must be proved. With respect, I am not able to agree. This case referred to the decision of the Federal Court in the case of *Pang Chee Meng v. PP* [1991] 1 MLRA 608; [1992] 1 MLJ 137; [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 where Abdul Hamid Omar LP said that in invoking s 27, the courts should be very vigilant to ensure the credibility of evidence by the police personnel which is so vulnerable to abuse. *Pang Chee Meng v. PP* did not decide that the information or words used by the accused must be exact and recorded in the language or words used by the accused.

[52] Although the Federal Court in *Sum Kum Seng v. PP (supra)* said that common sense stressed the desirability that the actual words be recorded somewhere, it ruled that there is no strict necessity at law to give the actual words used by an accused person in supplying the information that led to the discovery of a fact or thing under s 27. Another decision of the Federal Court in the case of *Amathevelli P Ramasamy v. PP* [2009] 1 MLRA 153; [2009] 2 MLJ 367; [2009] 3 CLJ 109 held that s 27 did not require the question to be recorded before the information might be admitted.

[53] In this case, PW14 testified that he was informed by PW13 that a male person had gone to the police station and who made a confession to PW13. He



said he then went to the office where PW13 together with L/Cpl Andrew and the accused were. He said PW13 again briefed him about the confession and he asked the accused whether it was true that the accused had killed a female and could the accused bring the police to the location where the body was thrown. PW14 said that the accused told them the accused did not know the name of the location but he could show the police the location. Subsequently, PW14 made a police report (exh. P69 and P69A) on the discovery of the body.

[54] As stated above, the defence objected to the admissibility of the above testimony of PW14 and to P69 and P69A. I have already ruled on the inadmissibility of the testimony of PW13 about what he told PW14 that the accused had confessed to killing a female. The prosecution had also put on record that it was not relying on the admissions made by the accused to PW13.

[55] During the trial, the learned DPP had also agreed to expunge the words 'Subjek mengesahkan perempuan berkenaan yang telah dibunuh olehnya dan dicampak ke dalam parit tersebut' from P69 and P69A after the learned counsel had objected to their admissibility. After the above words were expunged, the police report was tendered as P69 and P69A.

[56] Although PW14 did not record the information that led to the discovery of the body either immediately or as soon as possible, in the event that it is required to do so, notwithstanding what I have said in this judgment that it is not necessary, depending on the facts and circumstances of each case, I am of the view that the recording of the information in a police report will suffice: see *Krishna Rao Gurumurthi & Ors* [2000] 1 CLJ 446. The information must be such as has caused discovery of the fact. The fact discovered embraced the place from which the object ie, in this case the body of the deceased, was produced and the knowledge of the accused as to this and the information must relate distinctly to this fact: *Chong Soon Koy v. PP* [1977] 1 MLRA 213; [1977] 2 MLJ 78, *Wai Chan Leong v. PP* [1989] 1 MLRA 109; [1989] 3 MLJ 356; [1989] 2 CLJ 1168; [1989] 1 CLJ (Rep) 171.

[57] The information received by PW14 under s 27 was admissible. Now, what exactly was the information PW14 received? The question put by PW14 to the accused was whether it was true that the accused had killed a female and could he bring the police to the location where the body was thrown. The answer of the accused was that he did not know the name of the location but he could show the police the location. This was the information or answer given by the accused and which was admissible under s 27 EA.

[58] It is to be noted that the accused did not say he threw the body at this location. This was in the question asked by PW14 but the accused did not specifically say that he threw the body there. The question put by PW14 to the accused was based on the briefing he received from PW13. It is to be noted that PW13 did not initially testify that the accused could show the police the place where the body was thrown. PW13 had in fact testified that the accused could show the police the place where it happened (see p. 143 NOP). It was only subsequently that PW13 had said the accused could show him the place where the body was thrown (see p. 145 NOP). As stated above, the



prosecution had applied to expunge the words 'Subjek mengesahkan perempuan berkenaan yang telah dibunuh olehnya dan dicampak ke dalam parit tersebut' from P69 and P69A. Therefore, the testimony of PW13 (at p. 145 NOP) and of PW14 that the accused could show them the place where the body was thrown were not admissible in evidence.

[59] The testimony of PW14 (line 32 at p. 167 NOP) 'I asked is this the female that you throw? And he replied 'yes' and of PW13 (at line 25 at p. 145 NOP) that the accused had said 'this is the body of the girl that has been thrown here' were not admissible under s 27 EA because this was information or statements made after the discovery of the body: see *PP v. Basri Salihin* [1992] 3 MLRH 342; [1994] 2 MLJ 476; [1993] 1 CLJ 420, *Sulaiman Hamat v. PP* [2012] 2 MLRA 185; [2012] 4 MLJ 514; [2013] 3 CLJ 1027; [2012] 3 AMR 456.

[60] The next issue is on the admissibility of the sms messages mined or retrieved from the four mobile phones seized during the police investigation. The prosecution submitted that the data retrieved from these phones showed that it was the accused who strangled the deceased and the data showed his reasons or motives to kill the deceased. Although the data retrieved from the phones and SIM cards were contained in a report tendered as exh. P81, the defence objected to the admissibility of the data or information retrieved from the phones.

[61] PW11 said that she received four mobile phones from PW17 for analysis at the Makmal Forensik PDRM Jenayah Komputer section, at Cheras, Selangor. The first phone was a Sony Ericsson (exh. P67A) which was inside a green plastic bag seized from the front right trouser pocket of the accused. PW11 said that she could not analyse the phone because it was locked. The second phone was a Nokia (exh. P68A), black in colour, which was seized from the front left trouser pocket of the accused. There was a bracelet with the name 'Hui Chin' attached to the top left side of this Nokia phone. The bracelet was tendered as exh. P68B. All these were seized from the accused by Cpl. Zainal on the instruction of PW14 at the site where the body was discovered. PW14 handed these to PW17 at CPS Miri on the same day.

[62] The third phone was another Nokia, also black in colour (exh. P78A) which was seized from Huan Hui Chin by PW17. He lodged a police report (P76) in respect of the seizure. PW17 also seized the fourth phone, which was a LG (exh. P79A), which was seized from PW5. PW17 lodged a police report (P77) in report of the seizure of the LG phone. PW11 also could not analyse this phone because the software used in the laboratory's XRY equipment was not able to analyse the LG phone. She was able to analyse the two Nokia phones P68A, P78A and their SIM (Subscriber Identification Module) cards and the SIM card of the LG phone. She prepared a report (exh. P80) together with the annexure (exh. P81) after her analysis.

[63] PW11 said that by using the XRY equipment and software she was able to retrieve the contacts, telephone calls and sms made to and from the phones which were stored in the two Nokia and their SIM cards and the SIM card of the LG. Lampiran A1 of exh. P81 was the data retrieved from the Nokia



phone P68A, lampiran A2 was the data retrieved from the SIM card of this Nokia, lampiran B1 was the data retrieved from the second Nokia phone P78A, lampiran B2 was the data retrieved from the SIM card of this second Nokia and lampiran C1 was the data retrieved from the SIM card of the LG phone P79A.

[64] PW17 testified that P67A was registered in the deceased's name while P68A was registered in the accused name. PW17 said that he obtained the information on the phone registrations from the network carrier DIGI. The information from DIGI was marked as exh. P17.

[65] The information in P17 was provided by PW7 who was a senior working in the investigation department of DIGI. Upon request by PW17 she provided information for several mobile phone numbers under the DIGI network. PW17 showed that the phone numbers 0165257235 and 0165227235 were registered in the name of the accused and the phone number 0168724390 was registered in the name of the deceased.

[66] From her investigation, she testified that on 24 March 2011 there was no telephone call made between the numbers registered in the accused name and the phone number registered in the deceased's name. This would contradict the evidence of PW4 that the accused had talked to the deceased on 24 March 2011. However, PW7 said the data showed that on 24 March 2011 there were many exchanges of sms messages between the numbers 0165257235 and 0168724390 between 10.26am and 11.45am. No evidence was given as to the contents of these messages.

[67] Although the phone number 0168724390 was registered in the name of the deceased, there was no evidence that the Sony Ericsson (P67A) belonged to the deceased except for the testimony of PW17. PW17 said that he obtained the information from DIGI. Exhibits P16, P17 and P18 did not in any way mention or refer to a Sony Ericsson phone registered in the name of the deceased. PW7 did not testify that the number 0168724390 was used on a Sony Ericsson or that the deceased was using a Sony Ericsson mobile phone or that P67A belonged to the deceased. She was not shown P67A.

[68] P67A was not shown to the deceased's father, mother or brother (PW4, PW2 and PW9) for identification whether it belonged to the deceased when they testified in court. It was also not shown to the deceased's boyfriend (PW5) nor to the deceased's friend (PW6) for their identification whether it belonged to the deceased. The phone was not sent for any DNA analysis to confirm that it might have been used or was in the possession of the deceased. PW11 was not able to analyse the phone and there was no confirmation that the Sony Ericsson belonged to the deceased. Therefore, there was no basis for PW17 to say that P67A was registered in the deceased's name or belonged to the deceased.

[69] Further, PW14 said that the phones P67A and P68A were seized by Cpl. Zainal on his instructions. PW14 testified that he handed these two phones to PW17 on 25 March 2011 at CPS Miri. However, PW17 testified that these



two phones were handed to him by L/Cpl Hamzaima. PW17 did not lodge any police report on the seizure of these two phones but he said he recorded the seizures in his investigation diary. PW17 did not exhibit the diary and the prosecution did not clarify this discrepancy on the seizures of P67A and P68A.

[70] PW17 said that he investigated the contents of P80 and P81 and he found that the accused did send several sms messages to his girlfriend Kuan Hui Chin about the incident he committed. He referred to these messages in lampiran A1, A2 and B2 (see pp. 225-226 NOP). PW17 was referred to an entry ie, sms no. 4 at p. 8/9 of lampiran B2 dated 25 March 2011 at 4.51am. He said that this sms was sent from the phone number +60165257235 which belonged to the accused. He was also referred to another entry ie, sms no. 2 at p. 8/13 of lampiran A1 dated 25 March 2011 at 4.51am and the phone number +60165227235. He said that this phone number was registered in the name of the accused but the phone was used by the accused girlfriend by the name of Kuan Hui Ching.

[71] The four mobile phones and the SIM cards were devices for recording, storing, processing, retrieving or producing information and were described as devices by PW11 in her report. They came within the definition of 'computer' under s 3 EA and the data retrieved from these devices come within the definition of 'document' under the EA. The data was retrieved from the phones by using the XRY equipment and software which also came within the definition of a computer.

[72] The prosecution did not tender any certificate under s 90A of EA to prove that the document P81 was produced by a computer in the course of its ordinary use bearing in mind that it tendered the s 90A certificates when it tendered the photographs taken with the digital camera.

[73] PW11 did not testify that the document was produced by a computer in the course of its ordinary use. PW11 also did not testify that the computer referred to was in good working order and was operating properly in all respects throughout the material part of the period during which the document P81 was produced. PW11 did not say that the mobile phones or SIM cards or the XRY equipment and its software were in good working order and were operating properly in all respects throughout the material part during which P81 was produced. The evidence showed that she was not able to access or retrieve any data from the Sony Ericsson phone and that the software used in the XRY equipment was not able to access or retrieve any data from the LG phone.

[74] For these reasons the prosecution had not satisfied the requirements of s 90A. Therefore P81 was inadmissible notwithstanding that there was no objection for it to be marked as an exhibit when it was tendered as such during the trial: see *Ahmad Najib Aris v. PP* [2009] 1 MLRA 58; [2009] 2 MLJ 613; [2009] 2 CLJ 800.

[75] According to P17, the telephone numbers 0165257235 and 0165227235 were registered under the name of the accused person. PW17 said that at the



material times the accused was using the Nokia phone (P68A) with the number 0165257235 and his girlfriend Huan Hui Chin was using the other Nokia phone (P78A) using the number 0165227235. PW17 referred to the several sms messages between these two numbers to establish that the accused had texted his girlfriend about the killing and the reasons for killing the deceased.

[76] Looking at lampiran A1 which was retrieved from the Nokia phone P68A, Hui Ting's phone numbers stored in this Nokia were +6738699736 and 0168563115. Similarly, looking at lampiran B2, the phone number 0165257235 stored in the Nokia phone P78A was under a name 'Laogong' and not under 'Lee Kim Seng' or 'Kim Seng'. Therefore, the several exchanges of sms messages referred to by PW17 were purportedly between a Hui Chin and a 'Laogong' and not between the accused and Huan Hui Chin.

[77] The prosecution did not call Huan Hui Chin to testify that at the material times she was using the phone number 0165227235, that the accused was then using the phone number 0165257235, that the several sms messages were between her and the accused and that the person referred to as 'Laogong' and using the phone number 0165257235 to send her the messages was in fact the accused person. Instead, the prosecution offered her to the defence in the event the defence is called.

[78] This statement 'sms messages sent or received from the device' appeared at the top of p. 6/13 of lampiran A1. It also appeared on p. 8/9 of lampiran B2. Based on what PW11 had said to the court, the number +0165227235 shown at p. 6/13 of lampiran A1 referred to the telephone number of the receiver of this message. If that was true, similarly the number +60165257235 shown at p. 8/9 of lampiran B2 would also refer to the receiver of this message. If both telephone numbers were the receivers of the messages, who was the sender of these messages. Again, the prosecution did not clarify these discrepancies or messages.

[79] Further, looking at the sms messages highlighted by PW17 contained in P81, many of these messages were in a mixture of Mandarin, dialects or slangs. For examples, sms no. 6 at p. 6/13 of lampiran A1 with the message "She hai guo me many times. Think dao last time." and sms no. 2 at p. 7/13 of lampiran A1 with the message "Nien her neck". There was no translation or explanation what these messages meant. The messages in Mandarin, dialects or slangs were not admissible without any translation thereto. It would also not be safe for the court to guess at the meanings or significance of these messages and to come to a finding that these sms messages established that it was the accused who strangled the deceased to death and that the sms messages established his motive for killing the deceased.

[80] With the evidence relied on by the prosecution referred to in paras. 13(a), (b), (c) and (d) above not being admissible, there was no evidence that it was the accused who strangled the deceased or was responsible for the death.

[81] Where the prosecution's case is based on circumstantial evidence, motive



is important in such cases to tilt the scale against the accused: *Lim Hean Chong v. PP* [2012] 3 MLRA 567; [2012] 1 MLJ 149; [2012] 2 CLJ 1046. With the contents of P81 being not admissible, there was no evidence of any motive on the part of the accused to kill the deceased.

[82] There was no doubt that the accused knew where the deceased's body could be found and he led the police to the discovery of the body. That did not mean that he was responsible for the death of the deceased or that he had strangled the deceased to death.

[83] According to PW5 and PW10, the accused and the deceased were friends. On 24 March 2011, between 3pm to 4pm, they had gone to meet Lee Yunn Mei. There was no evidence what happened after that. There was no evidence whether the deceased was together with the accused after they met Lee Yunn Mei or whether they did meet Lee Yunn Mei. There was no evidence who was the last person who was with the deceased before she died. The prosecution did not call Lee Yunn Mei to testify about the meeting and whether after the meeting the accused left with the deceased or that the deceased left with Lee Yunn Mei or someone else. Again, instead, the prosecution offered Lee Yunn Mei as a witness to the defence.

[84] The DNA report (exh. P20) prepared by PW8 was *inter alia* in respect of the DNA analysis carried out on cotton swabs taken from the Toyota Vios usually used by the accused. It showed the presence of the accused's DNA and the deceased's DNA found in the car. This would be consistent with PW5's evidence that the deceased had gone out with the accused to meet Lee Yunn Mei. The DNA report also showed the presence of DNA from unknown sources found in the car. Was there a third person present? There was no explanation by the prosecution. If the Toyota Vios was also used by other family members of the accused, then they could be the contributors of such DNA sources but there was no confirmation as such or otherwise. The evidence showed that there was no bloodstain from the deceased found in the car.

[85] The DNA report also showed that a mixed DNA profile was developed from the swab of the black plastic bag which was tied round the head of the deceased. The deceased was the major contributor to this DNA profile. The DNA profile of the minor contributor could not be developed to be positively identified. The accused's DNA was not found on this black plastic bag.

[86] The accused's DNA was not found on the deceased's body or on the clothes that she was wearing at the material times. The accused's DNA was also not found at the place where the deceased's body was found.

[87] The conduct of the accused on 25 March 2011 in purportedly telling his father he had done something wrong and in purportedly sending the sms messages on the incident to Huan Hui Chin raised a lot of suspicion that that he was or might be responsible for the death of the deceased. However his father had denied that the accused had made any admission that he caused the death of a female and the prosecution chose not to call Huan Hui Chin on the



sms messages referred to. As stated above, the evidence relied on by the prosecution and set out in paras. 13(a), (b), (c) and (d) above has been ruled to be inadmissible. On the evidence before the court, there were too many gaps in the evidence presented by the prosecution. Although the accused knew and led the police to discover the body of the deceased, on the facts and circumstances of this case, the evidence presented before the court did not irresistibly point to one and only one conclusion ie, the guilt of the accused in causing the death of the deceased.

[88] After subjecting the evidence adduced by the prosecution to a maximum evaluation, the prosecution has failed to make out a *prima facie* case against the accused on the charge against him. The accused is discharged and acquitted.



PP
v.
JOACHIM SELVANATHAN & ORS

High Court Malaya, Johor Bahru
Vernon Ong Lam Kiat JC
[Criminal Trial No: MT (1) 45-14-2006]
18 August 2009

JUDGMENT

Vernon Ong Lam Kiat JC:

[1] In this case the three (3) accused persons are charged with two others still at large with the murder of one Rajendran a/l Allakan which charge reads as follows:

Bahawa kamu bersama-sama dua orang lagi yang masih bebas pada 15.8.2004, antara jam lebih kurang 8:30 malam dan 10:00 malam, di tepi Jalan Hang Jebat 12, Taman Skudai Baru, Skudai, di dalam daerah Johor Bahru, di dalam negeri Johor Darul Ta'zim, dengan memajukan niat bersama telah melakukan kesalahan membunuh dengan menyebabkan kematian ke atas Rajendran a/l Allakan K/P No. 581224-08-5559 dan dengan itu kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksan dibaca bersama seksyen 34 Kanun yang sama .

Prosecution Case

[2] Twenty-seven (27) witnesses were called by the prosecution to give evidence. The only eye-witness account of the incident is that of M. Vadivelu a/l Muthoo (SP14). SP14 is a close friend of the deceased. According to SP14 on 15 August 2004 at about 6pm he was having a drink with the deceased at a restaurant at Taman Tun Aminah. At about 8.30pm SP14 and the deceased were walking back to the deceased's home at Pangsapuri Jasa, Mutiara Rini, Johor Bahru. On the way they met an Indian man named Maniam at a food stall near the deceased's apartment. The deceased asked Maniam why he was still drinking samsu and had not gone home. Maniam replied with obscenities which infuriated the deceased who slapped Maniam on the face. Maniam fell down and SP14 helped to pick him up.

[3] Suddenly five (5) men appeared on the scene. Three (3) of the men came up from the front whilst two (2) others came from behind. SP14 said that he was able to see the faces of the three men; he did not see the faces of the two men who came from behind. SP14 identified the three men as the three accused persons (OKT1, OKT2 and OKT3) in the dock. One of the three men attacked and hacked SP14



with a parang. SP14 identified the man who attacked and hacked him as OKT3. SP14 said OKT3 hacked him with a parang on his face and chest. SP14 also saw the deceased being attacked and hacked with parang by OKT1 and OKT2. SP14 tried to help the deceased but the deceased shouted to SP14 to run away. As SP14 was running away he saw the deceased being hacked by three men. OKT3 chased SP14 who was running to his work place. SP14 lost consciousness when he reached his work place.

[4] SP14 said that when he and the deceased were attacked Maniam had already fled the scene. After he regained consciousness in the morning SP14 went to the deceased's house and was told by the deceased's wife about his death. SP14 then lodged a police report (exh. P51) on the incident at the Skudai police station. SP14 also said that he attended three identification parades. On each of these identification parades he identified each one of the three accused persons.

[5] Dr. Shahidan bin Mohd. Noor (SP16) a forensic pathologist conducted a post-mortem on 16 August 2004 on the deceased named Rajendran a/l Allakan (KP: 581224-08-5559) at Hospital Sultanah Aminah, Johor Bahru at the request of the investigating officer ASP Satheesh Menon. ASP Satheesh Menon who was present during the post-mortem identified the deceased to him. SP16 recorded his findings and prepared a post-mortem report (exh. P53). On external examination SP16 found superficial incised wounds on the upper right back, incised wounds on the head, incised wounds on the face, incised wounds on the right arm and wrist, incised wounds on the right index and middle fingers and incised wound on the inner left shin. On internal examination SP16, *inter alia*, recorded as follows:

Head:

The scalp was injured or incised at sites described. The skull 5-10 mm thick being thicker on front and back and thinner on the sides showed fragmented depressed fracture with free bone fragment 9x5cm to the left of vertex and another cracked fracture on the right occipital bone near the parieto-occipital suture. The brain coverings were not breached. The brain (1,250g) was grossly intact save for foci of contusions on the left vertex area.

The nasal bone was severed and the maxilla severed between the upper incisors until the left zygomatic arch.

Mouth, throat and neck structures.

The tip of the tongue was incised 3 cm on the right while other structures and organs of these areas were intact and unremarkable when eviscerated and examined.

[6] SP16 concluded that there were multiple incised wounds on the deceased's body especially on the head. Internally blood was aspirated into the airways with some degree of brain injury. The cause of death was formulated as due aspiration



of blood into the airways with head injury. In cross-examination SP16 testified that the combination of injury to the face and head was the most probable cause of death. There were several injuries to the body. The nature of the injuries suggest a sharp implement which when used with adequate force can cause such injuries. SP16 also said that the wounds inflicted were caused by an implement which can cut and from the wound profile, suggests that it was delivered with adequate force to cut the underlying soft tissue. The injuries could have been caused by the parangs (exhs. P10A and P11A). SP16 also agreed with the suggestion that based on the injuries sustained the deceased was under continuous attack and had died very soon after the attack.

[7] Sii Hie Hiong (SP13) testified that she saw her late husband Rajendran a/l Allakan on 15 August 2004 at about 5.30pm when she was on her way to work. Her late husband was then together with SP14. At about 1.30am the following day she received a call on her handphone informing of her husband's death. At about 8am SP13 went to the mortuary at Hospital Sultanah Aminah and saw her late husband's body. SP13 identified some of her late husband's personal effects which were found on him.

[8] ASP Satheesh Menon a/l Narayanan (SP27) testified that on 16 August 2004 he went to Jalan Hang Jebat 12 at about 12.30am together with a police party. When he arrived at the location he found a body of an Indian male along the side of Jalan Hang Jebat 12, Taman Skudai Baru, Skudai. He found a wallet covered in blood near to the body. Inside the wallet he found an identity card in the name of Rajendran a/l Allakan. SP27 then instructed Kpl Salleh to take photographs of the body and the crime scene. SP27 prepared a sketch plan (exh. P62) of the scene. At about 5am, SP27 and a police party went to flat 05-15, Blok P, Flat Pangsapuri Jasa, Taman Mutiara Rini. SP27 found an Indian man (identified as OKT1) inside the flat. Inside the flat SP27 found a parang next to a fridge in the kitchen. SP27 then arrested OKT1 and seized the parang (exh. P10A). SP27 also examined the surroundings of Blok P, Flat Pangsapuri Jasa and found a parang (exh. P11A) below Blok P which he seized. Later at 11am SP27 attended a post-mortem of the deceased together with Kpl Salleh. Kpl Salleh took some photographs of the deceased. SP27 subsequently received a copy of the post-mortem report (P53). Meanwhile on 17 August 2004 an Indian man named Murali (SP11) came to SP27's office and handed over a gold chain necklace (exh. P22A) to SP27. On 20 August 2004 SP27 requested C/Inspector Muhammad Nazif bin Wahab (SP15) to conduct an identification parade ('ID parade'). On 22 October 2004 SP27 requested ASP Izuddin bin Abd Wahab (SP25) to conduct an ID parade. On 3 May 2004 SP27 requested ASP Idris bin Karim (SP18) to conduct an ID parade.

[9] Chief Inspector Muhammad Nazif bin Wahab (SP15) testified that on 20 August 2004 he conducted an ID parade for the identification of OKT1. There were 13 individuals including OKT1 in the line-up, SP14 identified OKT1. SP15 prepared a report of the ID parade (exh. P52). ASP Izuddin bin Abd Wahab (SP25) testified that on 22 October 2004 he conducted an ID parade for the



identification of OKT2. Including OKT2 there were altogether 10 individuals in the line-up. At the ID parade SP14 identified OKT2. SP25 prepared an ID parade report (exh. P59). ASP Idris bin Karim (SP18) testified that on 3 May 2004 he conducted an ID parade for the identification of OKT3. There were 12 other individuals and OKT3 in the line-up. SP14 identified OKT3. SP18 also prepared an ID parade report (exh. P55).

[10] The chemist Baktiar bin Kassim (SP19) testified on the DNA analysis carried out on the exhibits submitted to him by SP27. SP19's evidence on the DNA profiling did not connect any of the accused persons to the parang (P10A and P11A), blood sample from the deceased (P15) or the blood found on the jeans (P12) or the T Shirt (P13).

[11] At the close of the prosecution case learned deputy submitted that the prosecution has proven the following four ingredients. Firstly, that there has been a death and that the deceased is Rajendran a/l Allakan. This fact is corroborated by the pathologist SP16, the investigating officer SP27, the wife SP13 and close friend SP14. Secondly, it has also been established through the evidence of SP16 that the deceased died as a result of the injuries which he sustained. Thirdly, the deceased sustained the injuries as a result of the act of all the accused persons. The evidence of SP14 who was present at the scene of the crime clearly shows that the deceased sustained injuries that caused his death as a result of the act of all the accused persons. SP14 was able to see the faces of the three men who came from the front as the three accused persons in the dock. SP14 identified OKT3 as the attacker who hacked him with a parang. SP14 also saw the deceased being hacked by OKT1 and OKT2 with a parang. SP14 attended 3 ID parades and on each occasion he identified each one of the three accused persons. In cross-examination SP14 testified that there was lighting and the crime scene was not dark. SP14 also said that there was lighting at the food stall. SP14 did not agree with the suggestion that he could not identify the three men who came from the front because it was dark and there was only very little lighting. SP14 also said that it was OKT3 who attacked him and that he did not know OKT3's name. SP14 also said that all the participants at the ID parades were Indian men. He said that at the first ID parade, all the participants entered into the room together. None of the participants were handcuffed. Learned deputy submitted that there was sufficient lighting from the roadside and the car park surrounding the food stall where SP14 and the deceased were attacked. The lighting was good enough to enable SP14 to identify and register in his memory the faces of the three accused persons. The slash marks on SP14's face and chest as shown in the photograph (exhs. P50A, B & C) corroborates the fact that he was attacked from the front by OKT3 and this gave him the opportunity to look at the assailant's face. The identification by SP14 was credible. The Turnbull guidelines are just guidelines and each case depends on its own facts. The Turnbull guidelines does not amount to inflexible rules with no exceptions (*Mohamad Yazri Minhat v. PP* [2003] 1 MLRA 171; [2003] 2 MLJ 241; [2003] 2 CLJ 65; [2003] 2 AMR 404 CA). The answers given by SP14 in



cross-examination were unwavering and firm. He stood by his evidence of the roles played by OKT1, OKT2 and OKT3 during the attack and his credibility was not shaken. Learned deputy also submitted that even if SP14's identification at the ID parades were rejected, the court might consider the dock identification made by SP14 of the three accused persons during the trial (*Ong Poh Cheng v. PP* [1998] 1 MLRA 544; [1998] 4 MLJ 8; [1998] 4 CLJ 1; [1998] 4 AMR 3225 CA). On the alleged discrepancies between SP14's evidence and his police report (P51) learned deputy submitted that it is normal for any man to have forgotten certain important details or what has been said in his report which was lodged four years before he testified. These discrepancies do not necessarily make SP14 an unreliable witness (*Mohamed Alias v. PP* [1981] 1 MLRH 574; [1983] 2 MLJ 172 ; *Che Omar Mohd Akhir v. PP* [1999] 1 MLRA 195; [1999] 2 MLJ 689; [1999] 2 CLJ 780; [1999] 3 AMR 2593 ; *Chean Siong Guat v. PP* [1969] 1 MLRH 329; [1969] 2 MLJ 63). SP14 is a credible witness and his evidence should be accepted even though there are some discrepancies.

[12] Fourthly, the prosecution relies on the paras. (a), (c) and (d) of s. 300 of the Penal Code in establishing the acts of the accused persons as murder. An intention to kill can be inferred by looking at the nature and number of injuries caused to the deceased person and the instrument used in inflicting these injuries which (*Tham Kai Yau & Ors v. PP* [1976] 1 MLRA 279; [1977] 1 MLJ 174 ; *Tan Buck Tee v. PP* [1961] 1 MLRA 604; [1961] 1 MLJ 176 ; *PP v. Sainal Abidin Mading* [1997] 4 MLRH 459; [1998] 3 CLJ 41). Applying illustration (a) above, learned deputy submitted that the intention to cause death of the deceased could be inferred from the injuries inflicted by OKT1, OKT2 and OKT3 on the head of the deceased. These injuries which resulted in internal blood being aspirated into the airways with some degree of brain injury was the cause of death. The injuries were inflicted on the vital part of the body. The injuries on the vital parts of the deceased's body inflicted with parang (a deadly weapon) is clear evidence of the intention of the accused persons to cause the death of the deceased. As for para. (c) above, learned deputy submitted that the only question to be considered is whether the three accused persons had the intention to inflict the fatal injuries on the deceased's head. If there was no intention on the part of the three accused persons then why did they deliberately aim their parang at the deceased's head. This shows a deliberate and calculated act to inflict injuries on the head. The accused persons knew that the injuries were sufficient in the ordinary course of nature to cause death. Accordingly, para. (c) is also fulfilled. Learned deputy further submitted that in striking at the deceased's head with a parang the three accused persons must be taken to know that their acts to be so imminently dangerous to the life of the deceased that it must in all probability cause death, (*William Tan Cheng Eng v. PP* [1970] 1 MLRH 280; [1970] 2 MLJ 244).

[13] As to common intention, learned deputy submitted that it must be shown that the criminal act was done by any one of the accused persons and that it was done in concert pursuant to a pre-arranged plan. Such a pre-concert or pre-arranged plan



can be developed on the spot or during the commission of the offence (*Suresh v. State of Uttar Pradesh* AIR [2001]1344). Common intention may be inferred from the facts and circumstances of the case and the conduct of the accused (*Namasiviam Doraisamy v. PP & Other Cases* [1987] 1 MLRA 73; [1987] 2 MLJ 336; [1987] CLJ (Rep) 241 SC). Learned deputy submitted that on the facts, the act of the three accused persons in attacking the deceased and SP14 indicates that they had acted and participated in the commission of the crime with intent to murder the deceased. There is no other explanation why the three accused persons attacked and hacked the deceased so viciously if they did not have the intention of causing death to the deceased. Their motive might not be clear but their common intention to kill the deceased is crystal clear as evident from the nature of the injuries on the deceased's face. On the evidence as a whole the prosecution has made out a *prima facie* case against OKT1, OKT2 and OKT3 on the charge under s. 302 of the Penal Code .

Defence Submission

[14] Learned counsel for OKT1 submitted that there is no direct evidence to implicate OKT1 with the death of the deceased. The prosecution case is based on circumstantial evidence. Therefore the burden on the prosecution is a heavy one and the evidence must point irresistibly to the guilt of the accused; and if there are gaps then that will not be sufficient (*PP v. Lin Lian Chen* [1992] 1 MLRA 297; [1992] 2 MLJ 561; [1992] 1 CLJ (Rep) 285). The prosecution's main evidence is that of SP14 which is inconsistent and unreliable. Under cross-examination SP14 contradicted himself when SP14 said that (i) three persons came up from the front and ran towards SP14 (ii) the men came and immediately attacked him, (iii) that happened in a manner of seconds, (iv) SP14 was afraid and ran away and then fainted, and (v) SP14 ran away to save himself. Learned counsel submitted that according to SP14's evidence SP14 and not the deceased was initially attacked by the three men. There is no evidence to say that the deceased was attacked first. This contradicts SP14's evidence in chief when he said that one of the three men hacked him on the face and chest and that he saw the deceased being attacked by three men. Learned counsel also submitted on the discrepancies between SP14's police report because there is no mention that two men came from behind. SP14 also changed his testimony when he agreed in cross-examination that he did not turn back and run away. However, in his evidence in chief SP14 said that he turned back whilst running away. Therefore based on what happened to SP14 it was impossible for SP14 to see what happened to the deceased. It is only SP14's supposition when he said that because the three men attacked him therefore they must have attacked the deceased. Learned counsel also submitted that the ID parade was not properly carried out by SP15 to the prejudice of OKT1. SP15 admitted that he never attended any course on ID parade and that his experience is based on his work experience. SP15 said on the date of the ID parade OKT1 was 28 years of age and that four of the line-up were below 21 years and one aged 38 years. The discrepancies in the age of the line-up have made it easier for the



accused to be identified. Further the ID parade is defective as the ID parade report did not contain details of the 'taraf hidup' and the clothes worn by the men in the line-up. There is also no confirmation that (i) OKT1 was given the option of choosing where to stand in the line-up and (ii) OKT actually gave the answers to the questions typed out in the ID parade report. Learned counsel also submitted that OKT1 would have stood out in the ID parade line-up because he had been remanded for four days. OKT1's unshaven sideburns, tangled hair and general appearance would have made it easy for him to be identified. Therefore the identification evidence of OKT1 is inadmissible as it is prejudicial to OKT1. Learned counsel also alluded to the possibility that the deceased was hacked by the two other men who are still at large. Lastly, it was contended that there is no evidence to link the parang (P10A) which was found in OKT1's house with the murder. Two important witnesses Vijaya a/p Permalu dan Maniam was not called by the prosecution. The investigating officer SP27 also agreed in cross-examination that the scene of the crime was dark. Therefore it is impossible for SP14 to have seen what happened to the deceased. OKT1 should be acquitted and discharged.

[15] Learned counsel for OKT2 submitted that OKT2 was mistakenly identified by SP14; or that SP14 concocted or fabricated his evidence to say that OKT2 was one of the five Indian men who murdered the deceased. On the night in question SP14 was drinking alcohol with the deceased. According to the investigating officer SP27, SP14 was drunk. SP14 contradicted himself when he said in cross-examination that he did not see the two men coming from behind because he ran away. SP14 also said that he saw the deceased being hacked by three men although he testified earlier that only two men were involved. SP14 appears to be confused and unsure of what really happened and how it happened. As the lights at the food stall was switched off, visibility nearby must have been poor. It was also contended that SP14 could not remember the colour scheme of the parang. Learned counsel also argued that SP14's evidence that he saw OKT3 coming towards him is a lie because in his evidence he saw three Indians coming towards him from the front and two from the back whilst in cross-examination he said all five came from the front. Further SP14 testified in cross-examination that the first time he saw OKT2 was in the police station after OKT2 was arrested. Learned counsel also contended that SP14's police report (P51) was lodged after SP14 was informed that the deceased was killed. The omission to mention the involvement of the accused persons is significant. SP14 did not explain why he omitted this important and material fact. As SP14's evidence in court is the only witness implicating the accused persons it was not safe to treat SP14 as a truthful witness (*Lee Ah Seng & Anor v. PP* [2007] 1 MLRA 472; [2007] 4 MLJ 393; [2007] 4 CLJ 1 FC). It was also submitted that the quality of identification of OKT2 does not satisfy the Turnbull guidelines because: (i) SP14 only saw the assailants for a few seconds, (ii) the lapse of four years between the original observation and the subsequent dock identification in court should not be accepted, (iii) SP14 saw the assailants whilst undergoing the trauma of been attacked and hacked, (iv) there were no special or distinct marks to remember the assailants by, (v) there was no



lighting at the food stall and only lighting from the street light, (vi) SP14 had never seen OKT2 before and (vii) SP14 did not describe the assailants to the investigating officer. It was also contended that the identification of OKT2 by SP14 at the ID parade is of no weight because SP14 was shown a photograph of OKT2 before the ID parade. Further OKT2 had been in remand for two weeks prior to the ID parade; he had spotted a grown-beard and moustache and had long hair. He was light-skinned and much younger than the participants. The ID parade was not conducted fairly (*Low Thim Fatt v. PP* [1988] 3 MLRH 136; [1989] 1 MLJ 304 ; *Chan Sin v. PP* [1949] 1 MLRA 495 ; [1949] 15 MLJ 106). There is also no supporting identification evidence available to connect OKT2 to the murder. The DNA evidence derived from the exhibits did not connect OKT2 to the murder. Further the fact that no DNA samples were taken from OKT2 has prejudiced OKT2. There is no evidence that the parang (P10A and P11A) were dusted for fingerprints (*PP v. Toh Kee Huat* [1964] 1 MLRH 110; [1965] 1 MLJ 76 ; *Chang Kim Siong v. PP* [1967] 1 MLRA 123; [1949] 1 MLJ 109 ; *Lai Ah Kam & Anor v. Rex* [1939] 1 MLRH 318 ; *Chooi Kam Woh v. Regina* [1954] 1 MLRH 267; [1954] 1 MLJ 264). Learned counsel further submitted that the prosecution's failure to call Maniam as a witness has occasioned a serious miscarriage of justice. Maniam was at the scene of the incident. He would have been able to shed light on who murdered the deceased. No sufficient efforts were made to trace him (*PP v. Kalaiselvan* [2001] 6 MLRH 495; [2001] 2 MLJ 157; [2001] 4 AMR 3973). Finally, learned counsel contended that OKT2 has been misled and prejudiced by the prosecution's failure in its opening speech to properly outline the nature of the case and the evidence against OKT2. For the foregoing reasons the prosecution has failed to establish a *prima facie* case and OKT2 should be acquitted and discharged.

[16] Learned counsel for OKT3 submitted that there is no direct evidence that OKT3 attacked and murdered the deceased. Firstly, the evidence of SP14 is untruthful, unreliable and tainted with discrepancies. In cross-examination SP14 said that he and the deceased were drinking beer at about 5pm. SP14 could not remember what kind of beer he consumed. When the attack took place at the food stall it was dark. The food stall was already closed. The light to the food stall had been switched off. There was a little light from a car park. The car park was closed and there was no car park office. There is no evidence as to whether there were lights from a shop situated about 50 feet from the food stall. The only source of light is the little light from the car park about 100 feet away. The assailants came from the direction of the car park so that their faces must have been dark and not visible. SP27 confirmed that the food stall was closed. SP27 said that the nearest source of light would be a street lamp about one meter away. SP27 did not see any lights from the car park. SP27's evidence contradicts SP14 evidence on this issue. SP14 was the first person to be attacked; the attack happened within a few seconds and he immediately ran for his life. In that state of panic SP14 could not possibly see the face of OKT3. SP27 agreed that SP14 and the deceased were drunk when the attack took place. SP14 contradicted himself when he said that he had looked behind when he was running away. In cross-examination SP14 agreed that he was



very frightened and that he did not look behind him when he was being chased but just kept on running to save his own life. This also contradicts SP14's evidence that when he ran for his life he saw the deceased being hacked by three men. SP14 description of the parang is also wrong; the parang was not white or shiny as alleged. If OKT3 had been chasing him, then it would not be possible for OKT3 to have hacked and killed the deceased (*PP v. Logaraja Ratnam* [2004] 2 MLRH 254; [2004] 8 CLJ 483; [2005] 2 AMR 221). There is no evidence that OKT3 had hacked the deceased before he chased SP14 from the food stall. There is no evidence that OKT3 ran back to attack the deceased. SP14's police report (P51) that the assailants appeared 10 minutes after the deceased had slapped Maniam contradicted his testimony that the assailants appeared suddenly when he helped Maniam get up after being slapped by the deceased. SP14 failed to disclose details of the second half of the events he testified to. It is the prosecution's duty to close the gaps that exist in P51. This omission is fatal to the prosecution (*Lee Ah Seng v. PP* [2007] 1 MLRA 784; [2007] 6 MLJ 1; [2007] 5 CLJ 1 FC).

The Law

[17] In the present charge the prosecution has invoked s. 34 of the Penal Code in order to impose joint criminal liability on all the three accused persons. Section 34 reads:

34. Each of several persons liable for an act done by all, in like manner as if done by him alone.

When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

Section 34 is essentially a rule of evidence. To infer joint responsibility on the three accused persons for the criminal act s. 34 must be read together with s. 302 of the Penal Code . The law on s. 34 has been enunciated recently by the Federal Court in *Krishna Rao Gurumurthi v. PP And Another Appeal* [2009] 1 MLRA 23; [2009] 2 CLJ 603 . At p. 626 Richard Malanjum CJSS said:

It is settled law that s. 34 is a rule of evidence and does not create a substantive offence. Simply put it is a statutory recognition to the common sense principle that if more than two persons intentionally do a thing jointly it is just the same as if each one of them had done it individually. It is an embodiment of the concept of joint liability in doing the criminal act based on common intention. Hence, an accused person is made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all irrespective of the role he played in the perpetration of the offence. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act.

The essence of a common intention is a question of fact in each case to be



proved mainly as a matter of inference from the circumstances of the case. It has been said that as common intention essentially being a state of mind direct evidence as proof is difficult to procure. Invariably inferences have to be relied upon arising from such acts or conduct of the accused, the manner in which the accused arrived at the scene, the nature of the injury caused by one or some of them or such other relevant circumstances available. Indeed the totality of the circumstances must be taken into consideration in arriving at a conclusion whether there was common intention to commit the offence for which the accused can be convicted. The facts and circumstances of each case may vary. As such each case has to be decided based on the facts involved. Whether an act is in furtherance of the common intention is an incident of fact and not of law.

For a charge premised on common intention to succeed it is essential for the Prosecution to establish by evidence, direct or circumstantial, that there was a plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of s. 34 notwithstanding that it was pre-arranged or on the spur of the moment provided that it must necessarily be before the commission of the offence.

[18] In order for s. 34 to apply four ingredients must be present. They are: (i) a criminal act, (ii) a common intention between the parties, (iii) participation in the doing of the act, and (iv) act done in furtherance of the common intention. Firstly, the criminal act includes all the acts done by the persons involved which cumulatively resulted in the commission of the criminal offence. Secondly, the words 'common intention' in s. 34 must be read in the context of 'in furtherance of the common intention of all'. In this context it becomes clear that persons 'acting in concert may be liable for an act, which may not be exactly the same act jointly intended by them, but has been done in furtherance of their common intention' (see *Bashir v. State* AIR [1953] All 668 at [15] per Desai J). Before a common intention can be inferred it must be shown that the criminal act was done pursuant to a pre-arranged plan (*Chan Chun Ling & Anor v. PP* [1955] 1 MLRH 775 ; *Muhamad Safarudin Baba & Anor v. PP* [2002] 1 MLRA 577; [2002] 4 MLJ 353; [2002] 4 CLJ 210; [2002] 4 AMR 3980 ; *Lee Kwai Heong & Anor v. PP* [2006] 1 MLRA 1; [2006] 2 MLJ 528; [2006] 1 CLJ 1043; [2006] 3 AMR 26). This requirement of a pre-arranged plan, however, is not absolute. Common intention can be formed moments prior to the commission of the offence so long as the evidence shows that the parties acted in concert (*Asogan Ramesh s/o Ramachandren v. PP* [1998] 1 SLR 286). Common intention being essentially a state of mind it is practically impossible to prove a pre-arranged plan between the parties. Accordingly, inferences have to be drawn from the acts of the parties and the surrounding circumstances of the case. Thirdly, the ingredient of participation does not necessarily require presence at the scene of the crime in every case. In this modern technological era assistance in committing an offence can be given without physical presence at the scene. Whether the accused had participated to a sufficient



degree so as to be deemed as culpable as the principal offender is an incident of fact (*Sabarudin Non v. PP & Other Appeals* [2004] 2 MLRA 17; [2005] 4 MLJ 37; [2005] 1 CLJ 466; [2005] 1 AMR 4 CA). Lastly, there are three categories of acts which are considered to be done in furtherance of the common intention. According to *Ratanlal and Dhirajlal's Law of Crimes*, 25th edn, 2003 these acts are described as follows:

... firstly, the act which is directly intended in between all the confederates; secondly, the act which the circumstances of the case leave no doubt to conclude that though the act was not directly intended in between them but was taken by all of them as included in the common intention, and thirdly the act which any of the confederates commits in order to avoid or remove any obstruction or resistance put in the way of the proper execution of the common intention. In doing the third type of the act the individual doer may cause a result not intended by any other of the confederates.

[19] In a charge for murder under s. 302 of the Penal Code , the onus lies upon the prosecution to prove the following ingredients of the offence *viz* :

- (i) the death of the deceased;
- (ii) the deceased's death was caused by injury or injuries inflicted on the deceased;
- (iii) the accused persons had caused the injury or injuries which resulted in the deceased's death;
- (iv) the act which caused the death was committed with the *mens rea* (see s. 300(a), (b), (c) or (d) of the Code) if:
 - (a) the act is done with the intention of causing death; or
 - (b) the act is done with the intention of causing such bodily injury as the accused knows to be likely to cause the death of the deceased; or
 - (c) it is done with the intention of bodily injury to the deceased and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
 - (d) if the accused knew that it was so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commit such act without any excuse for incurring the risk of causing death or such injury.

Burden And Standard Of Proof At Close Of Prosecution's Case

[20] At the close of the prosecution's case, it is the duty of the court to consider



whether the prosecution has made out a *prima facie* case against the accused. In this respect, s. 180 of the Criminal Procedure Code ('CPC') provides as follows:

Section 180

- (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.
- (2) If the Court finds that a *prima facie* case has not been made out against the accused, the Court shall record an order of acquittal.
- (3) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

[21] What is the standard of proof on the prosecution at the close of its case? Subsection (1) makes it clear that the standard of proof is on the prosecution to make out a *prima facie* case. Subsection (2) provides that the court shall record an order of acquittal if a *prima facie* case has not been made out. On the other hand, if a *prima facie* case has been made out subsection (3) provides that the accused shall be called upon to enter his defence. Thus, whether or not the accused is acquitted or called upon to enter on his defence at the close of the prosecution case turns on the meaning of the phrase '*prima facie* case'.

[22] In *Balachandran v. PP* [2004] 2 MLRA 123; [2005] 2 MLJ 301; [2005] 1 CLJ 85; [2005] 1 AMR 321 the Federal Court when called upon to consider the standard of proof on the prosecution at the close of the case for the prosecution has this to say at p. 99:

A *prima facie* case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase "*prima facie* case" is defined in similar terms in *Mozley and Whitley's Law Dictionary*, 11th edn as:

A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.

The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a *prima facie* case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier.



In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established.

And continuing at p. 100,

The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case of the prosecution. If there is any such doubt there can be no *prima facie* case.

[23] In order to determine whether the elements of the offence have been established, the court must undertake a positive evaluation of the credibility and reliability of all the evidence adduced. In this regard the court must undertake a maximum evaluation of the prosecution evidence. In *PP v. Mohd Radzi bin Abu Bakar* [2005] 2 MLRA 590; [2005] 6 MLJ 393; [2006] 1 CLJ 457; [2005] 6 AMR 203 the Federal Court has this to say at p 465:

After the amendments to ss. 173(f) and 180 of the CPC, the statutory test has been altered. What is required of a subordinate court and the High Court under the amended section is to call for the defence when it is satisfied that a *prima facie* case has been made out at the close of the prosecution case. This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter on his or her defence. *It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. Thus, if the prosecution evidence admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused.* See, *Tai Chai Keh v. PP* [1948-49] MLJ Supp 105; *PP v. Kassim b Soeb*. If the court, upon a maximum evaluation of the evidence placed before it at the close of the prosecution case, comes to the conclusion that a *prima facie* case has not been made out, it should acquit the accused. If, on the other hand, the court after conducting a maximum evaluation of the evidence comes to the conclusion that a *prima facie* case has been made out, it must call for the defence. If the accused elects to remain silent, the court must proceed to convict him. It is not open to the court to then re-assess the evidence and to determine whether the prosecution had established its case beyond a reasonable doubt. The absence of any evidence from the accused that casts a reasonable doubt on the prosecution's case renders the *prima facie* case, one that is established beyond a reasonable doubt. Put shortly, what the trial court is obliged to do under ss. 173(f) and 180 of the CPC is to ask itself the



question: If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence now before me? See, *Dato Mokhtar b Hashim & Anor v. PP* [1983] 1 MLRA 7; [1983] CLJ (Rep) 101; [1983] 2 CLJ 10 ; [1983] 2 MLJ 232. If the answer to that question is in the affirmative, then the defence must be called. And if the accused remains silent, he must be convicted. If the answer is in the negative, then the accused must be acquitted. (emphasis added)

[24] In short this court should take the following steps at the close of the prosecution's case:

1. Subject the prosecution evidence in its totality to maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;
2. Ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence before me? If the answer to that question is "Yes", then a *prima facie* case has been made out and the defence should be called. If the answer is "No" then, a *prima facie* case has not been made out and the accused should be acquitted;
3. After the defence is called, the accused elects to remain silent, then convict;
4. After the defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v. PP* [1963] 1 MLRH 400; [1963] MLJ 263 ; [1963] 263.

Findings Of The Court At The Close Of The Prosecution Case

[25] On the evidence as presented thus far the court finds that (1) there has been a death and that the deceased is Rajendran a/l Allakan; (2) the deceased died as a result of the injuries he sustained; and (3) the intention to cause the death of the deceased could be inferred from the injuries inflicted on the deceased. Did the deceased sustain the injuries as a result of the act of all the accused persons? This depends on whether there is any evidence implicating them to the crime.

[26] In this connection it is important to examine whether the parang exhs. P10A and P11A connect the accused persons to the crime. P10A was seized in flat unit no. 05-15 Blok P, Flat Pangsapuri Jasa, Taman Mutiara Rini where OKT1 was found and subsequently arrested. P11A was found below Block P, a public place. Anyone could have put it there. SP14 said that the parang used in the assault looked like those in the photographs of P10A and P11A (P6A & B). When asked about the parang in cross-examination SP14 said "Warna parang tidak ingat" but later said "parang berwarna putih - bahagian hadapan parang putih dan berkilat."



The forensic pathologist SP16 said that the injuries on the deceased could have been caused by P10A and P11A. The chemist (SP19) examined and analysed the traces of blood on P10A and P11A. SP16 was unable to obtain any DNA profile from the traces of blood on P10A and P11A. No finger prints were lifted from P10A and P11A. In the circumstances the parang P10A and P11A does not unequivocally connect the accused persons with the crime. There exists only a possibility that P10A and or P11A could have been used in the attack on the deceased.

[27] In this connection it is also necessary to consider the DNA evidence of (i) a cotton swab (P9) taken at the scene of the crime; (ii) a pair of jeans (P12) and a T-shirt (P13) seized from flat unit 05-15; (iii) 2 tubes of blood swabs (P14) taken from Block P; and (iv) a sample blood (P15) of the deceased. According to the DNA profiling the blood stains on the pair of jeans P12 did not belong to the deceased. No DNA profile was obtained from the T-shirt P13. The DNA profile of the blood swabs (P14) also showed that the bloodstains do not match that of the deceased.

[28] Learned deputy also applied to introduce a statement under s. 112 of the Criminal Procedure Code recorded from Vijaya a/p Perumal. Efforts to trace Vijaya were made by SP22, SP23 and SP24. SP22 took over as investigating officer from SP27. SP22 checked at the National Registration Department for Vijaya's last known address. SP22 said that he instructed SP23 to check the last known address but Vijaya was not there. SP22 then placed notices in Chinese, Malay and Tamil vernacular newspapers for Vijaya on 4 January 2009 but there was no response. SP22 admitted in cross-examination that SP23 went to Vijaya's last known address but she was not there. Vijaya's brother who was residing there said that he was not in touch with Vijaya because of family problems. He also said that Vijaya had gone back to Perak. SP24 went to the last known address to serve a subpoena on Vijaya. SP24 met Vijaya's brother who told him that Vijaya had left four years ago. He told SP24 that Vijaya had moved to Perak and that he did not have Vijaya's contact number or new address. SP22 agreed in cross-examination that the efforts to trace Vijaya "bukan terbaik dan sempurna". The general rule of evidence is that the best evidence must be adduced. By way of exception under proviso (c) of s. 32 of the Evidence Act 1950 statements which are relevant facts made by a person whose attendance cannot be procured without an amount of delay or expense which appears unreasonable may be admitted. The burden is on the prosecution to satisfy the said condition. In this case the efforts taken to trace Vijaya were not pursued vigorously and thoroughly. No attempts were made to check with the immigration department to determine if Vijaya had left the country. SP22 did not produce any copies of the notices that was purportedly advertised in the vernacular press. Mere ignorance of the whereabouts of Vijaya is not sufficient. The court is not satisfied that Vijaya's attendance cannot be reasonably procured without an amount of delay or expense. Even if this statement is admitted, it must be scrutinised as to its veracity. In the first place, Vijaya's date of birth is inconsistent with the identity



card number written on the statement. Juraimah bt Ismail (SP26) Cif Inspektor agreed with defence counsel's suggestion that the last four digits of the identity card number '5345' belongs to a male person because it is an odd number. SP26 explained that she did not see the identity card; SP27 inserted the identity card number by his handwriting on the statement. There is doubt as to whether the statement was actually recorded from Vijaya a/p Perumal or some other person. Secondly, SP26 admitted that the word "Orang itu" in Ceraian (ii) is wrong and the correct word is "Kamu". If so, then it begs the question of whether the caution was properly administered prior to the recording. Taken in its totality the statement is unreliable; it is also prejudicial to the accused persons since they cannot cross-examine Vijaya on it.

[29] In the circumstances the only evidence connecting the three accused persons with the crime is the identification evidence of SP14. There is no other forensic or supporting evidence to connect the accused persons with the crime. The defence contends that the identifications are mistaken and not in compliance with the Turnbull guidelines. SP14 identified the accused persons at 3 ID parades held on 20 August 2004, 22 October 2004 and 3 May 2005. On 22 August 2008 SP14 identified the three accused persons in court. The question to be determined is whether in totality the identification evidence of SP14 is reliable.

[30] It is a settled principle of law that where a witness identifies an accused person who is not known to him in court for the first time, his evidence is of little value unless there has been a previous ID parade identification (*Kanan v. State of Kerala* AIR [1979]1127). In *Arumugam Muthusamy v. PP* [1998] 1 MLRA 377; [1998] 3 MLJ 73; [1998] 3 CLJ 597; [1998] 3 AMR 2293 the Federal Court held that (i) dock identification of an accused for the first time at the trial is undesirable; and (ii) it would be good practice to hold an ID parade, which if it turns out positive, would tend to strengthen the case for the prosecution. Evidence of an ID parade identification is admissible under s. 9 of the Evidence Act 1950. There is no written law on the procedure for ID parade. However, the procedure has been neatly encapsulated in *Mallal's Criminal Code* (4th edn) at p 155. The practice of holding a proper ID parade may be summarised as follows:

- (1) All persons on the ID parade should be of the same ethnic group and same station in life as the suspect. The disparity of ages between them should not be large. The persons in the line-up need not be of exactly the same description.
- (2) The ID parade must be held at the earliest opportunity and all available witnesses should be required to attend at the very first parade. Separate ID parades must be held where there are two or more suspects.
- (3) The witnesses must not be allowed to see the suspect until the moment when everything is ready and they walk in to identify him. The witnesses should not be not given any prior assistance by photographs or by any verbal or written description.



(4) The suspect should be placed among a number of persons in a row - not less than 9 or 10. The suspect should be invited to stand where he pleases in the row. He may change his position after each witness has been called in. He should be asked if he has any objection to any of the persons present or to the mode of arrangement.

(5) The witnesses should be brought in one by one. Each witness who has completed the ID parade process should be kept apart from the witnesses who are yet to come.

(6) The officer in charge must ensure that the ID parade is properly and fairly conducted. He must record every circumstance connected with the identification, the names of the witnesses and their decisions as fully and fairly and carefully.

SP14's ID Parade Identification Evidence

[31] The first ID parade was conducted on 20 August 2004 by SP15. The line-up consisted of OKT1 and 12 other Indian men. Their ages varied between 18 to 30 years. OKT1 chose his position in the line-up. SP15 also said that SP14 entered after the line-up was ready. SP14 walked past the line-up and identified OKT1 by touching on OKT1's shoulder. SP15 prepared a report of the ID parade (P52). In cross-examination SP15 said that four of the persons were below the age of 21 years. One was 38 years old. SP15 denied that OKT1 was dressed in remand uniform at the ID parade. SP15 said that he informed OKT1 of his right to object but OKT1 did not object to any of the persons present. OKT1 was 27 years old at the material time. According to P52 the disparity of ages of the 12 other persons present in the line-up are as follows: 18 years (two persons), 19 years (two persons), 21 years, 22 years, 24 years, 28 years, 30 years, 31 years, 32 years and 38 years. In cross-examination SP14 agreed that after he failed make any identification at the first ID parade, he went to see three police officers by the name of Alex, Menon and Raja. The said police officers were in the ID parade room. In re-examination SP14 said that they told him to identify only OKT3 which he then did. SP27 agreed that before the ID parade is conducted the persons would be lined-up in the detectives' room while SP14 was waiting in the holding room. SP27 agreed that it is possible for SP14 in the holding room to see what is happening outside when the accused persons are brought to the detectives' room.

[32] The second ID parade was held on 22 October 2004. SP25 who conducted it said OKT2 and nine other Indian men were included in the line-up. OKT1 was informed of his right to choose his position in the line-up. OKT2 did not object to any of the other persons present. SP14 identified OKT2 when he touched OKT2 on the shoulder. SP25 prepared a ID parade report (P59). In cross-examination SP25 said that OKT2 was quite tall, looked thin, had short hair and moustache and some sideburn. However, SP25 could not remember if OKT2 had a full grown beard and long hair even though OKT2 was in remand for 15 days. SP15 was not



sure if the photographs of the suspects were displayed in the room where the ID parade was held. SP25 also said that he could not remember whether he told OKT2 that he had a right to object to the other persons present. Since OKT2 did not say anything SP25 assumed that OKT2 was satisfied with the manner the ID parade was conducted. SP25 could not remember if OKT2 was wearing remand uniform at the ID parade. SP25 agreed that OKT2 is light-skinned for an Indian. SP25 could not remember if the nine persons present were light-skinned or dark-skinned. At the time of the ID parade OKT2 was 22 years of age. According to P59 of the disparity of ages of the nine other persons present in the line-up are as follows: 20 years, 26 years, 27 years, 32 years, 35 years, 39 years (two persons), 40 years and 54 years. Prior to the ID parade SP25 had shown SP14 a photograph of OKT2. The third ID parade was conducted by SP18 on 3 May 2005. SP18 testified that OKT3 and 12 other Indian men were in the line-up. He informed OKT3 of his right to object to the persons present. OKT3 did not make any objections. SP18 also asked OKT3 to select his position in the line-up. OKT3 was identified by SP14 when he touched OKT3's shoulder. SP18 also said that he ensured that the persons present were within the same age group and physical build as OKT3. SP18 prepared a report of the ID parade (P55). Under cross-examination SP18 said that he could not remember if OKT3 was wearing remand uniform at the ID parade. SP18 was not sure if OKT3 had long hair or thick moustache. SP18 could not remember if the other persons present had long hair or thick beard. As at the date of the ID parade OKT3 was 28 years old. According to P55 the disparity of ages of the 12 other persons present in the line-up are as follows: 22 years, 23 years, 24 years, 26 years (two persons), 27 years (three persons), 29 years, 30 years (two persons) and 38 years.

[33] At the first ID parade there was a disparity of age between the persons in the line-up. Allowing for a disparity of say five (5) years, five of the persons were much younger and one much older. This leaves only six persons remaining. At the second ID parade the age disparity between the persons was even larger. Of the nine persons in the line-up six can be discounted for being much older than OKT2. In addition, there is doubt as to (i) whether OKT2 was informed of his right to object to any of the persons present and (ii) whether OKT2 wore remand uniform at the ID parade. It is possible that SP14 may have been shown a photograph of OKT2 prior to the second ID parade. At the third ID parade there is doubt as to whether OKT3 wore remand uniform. In principle a breach of the procedural requirement in holding an ID parade does not necessarily make the identification evidence inadmissible. The deficiencies may affect the weight to be attached to such evidence (*Thirumalai Kumar v. PP* [1997] 3 SLR 434, 441; *PP v. Ong Phee Hoon James* [2000] 3 SLR 293, 306). However, where there is evidence of bad faith or a deliberate flouting of procedural requirements rather than mere inefficiency, the identification will probably not be upheld (*R v. Finley* [1993] Crim LR 50). In the circumstances described above whilst there is no evidence of any bad faith or deliberate flouting of procedural requirements, there were significant age disparities and some deficiencies. Applying the aforesaid principles to the aforesaid



facts the court is of the view that the ID identification evidence is admissible but not much weight can be attached to it.

Evaluation Of SP14's Identification Evidence As A Whole

[34] The primary issue is to be considered is the identity of the three accused persons which the defence alleges to be mistaken. In assessing the identification evidence as a whole the court will be following the Turnbull guidelines (*Arumugam Muthusamy v. PP* [1998] 1 MLRA 377; [1998] 3 MLJ 73; [1998] 3 CLJ 597; [1998] 3 AMR 2293 ; *Ahmad Najib Aris v. PP* [2009] 1 MLRA 58; [2009] 2 CLJ 800 FC). The Turnbull guidelines were laid down by the Court of Appeal in *R v. Turnbull & Ors* [1976] 3 All ER 549 to assist the trial court in the evaluation of the identification evidence. The guidelines may be summarised as follows:

- (a) Caution must be exercised when the evidence turns on the evidence of visual identification; bearing in mind that a mistaken witness can be a convincing one.
- (b) The circumstances in which the identification by the witness were made must be carefully examined. Factors which affect the quality of the identification evidence include: how long the witness observed the accused; how often?; under what light?; at what distance?; was there any impediment in the way?; was the accused known to the witness previously?; any special reasons for witness to remember the accused?; any material discrepancies between description given to the police and the accused's actual appearance?; time elapse between original sighting and subsequent ID parade identification.
- (c) Where the quality of the identification evidence is poor the court should acquit unless there is other evidence in support of the correctness of the identification.
- (d) The evidence which is capable of supporting the identification evidence should be specified.

[35] On the night in question SP14 was drinking beer with the deceased from 6pm or earlier. On the way back to the deceased's house they stopped at a food stall at about 8.30pm. There the deceased met Maniam. The deceased admonished Maniam which led to an altercation between the deceased and Maniam. During the altercation five assailants suddenly appeared; three from the front and two from behind. SP14 said that he saw the faces of the three assailants who came from the front. SP14 identified the three accused persons as the three assailants. SP14 testified that OKT3 hacked at him with a parang whilst OKT1 and OKT2 hacked at the deceased with a parang. SP14 did not see the two other assailants who came from behind. SP14 ran for his life pursued by OKT3.

[36] In cross-examination SP14 said that he was drinking beer with the deceased at about 5pm. At that time the food stall was closed and the lights at the food stall



were not switched on. To the right of the food stall is a shop about 50 feet away. Nearby the food stall about 15 feet away is a road and a car park about 100 feet away. There was some lighting at the car park. SP14 said that the food stall was bright. The three assailants came from the direction of the car park. In re-examination SP14 said that at the time of the incident there was light at the car park and the road and the food stall was bright. SP14's made a police report (P51) on the incident about 16 hours after the incident. P51 does not contain any reference to the two men who came up from behind or to the attack on the deceased.

[37] The investigating officer SP27 testified in cross-examination that he did not see any car park with lighting near the food stall. SP27 agreed that according to the food stall and the structure it is impossible for the street light to be about 15 feet away and that it must have been more than that. SP27 also said that the deceased, SP14 and Maniam were drunk; the food stall was a very dark place and the only light is the street light. SP27 also admitted that he may have shown SP14 a photograph (ID16) of OKT2 on 17 August 2004.

[38] SP14 did not give any description of the three assailants to SP27. SP14's police report on the incident (P51) was made the day following the incident. By that time SP14 had already known that the deceased had been killed. However, he did not say anything about the attack on the deceased by the three assailants. In effect, P51 only corroborates SP14's evidence that he was attacked and hacked with parang. P51 does not corroborate SP14's evidence on the three accused persons attacking and hacking the deceased. SP14 did not give any reason for this material omission. The dock identification of the three accused persons by SP14 on 22 August 2008 comes four years after the incident on the night of 15 August 2004. The time elapse of four years between the original observation and the subsequent dock identification is significant. In addition the three accused persons are not known to SP14. SP14 did not give any reasons to say why or how he remembered the three accused persons. SP14 observation of the assailants must have been made in the heat of the moment.

[39] In short the circumstances surrounding the identification by SP14 are as follows: (i) the incident happened at night; (ii) SP14 observed the assailants in the heat of the moment before he ran away; (iii) SP14 was in a state of shock; (iv) SP14 may have been in a state of intoxication; (v) the three accused persons are not known to SP14 previously; (vi) there was no light at the food stall and it was dark; (vii) no description of the accused person's appearances were given by SP14 to the police; (viii) there is no special reason for SP14 to remember the accused persons; and (ix) the time elapse of four years between the original sighting and the dock identification. For the foregoing reasons the court finds that SP14's identification evidence is weak and unreliable.

[40] In the premises the only evidence which links the accused persons with the commission of the offence are the circumstantial evidence described above. Where



a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstantial evidence from which an inference of guilt is sought to be drawn must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused and (iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, ie, to say the circumstances should be incapable of explanation on any reasonable hypothesis save that of the accused's guilt (*Chandmal & Anor v. State of Rajasthan* AIR [1976] 917 SC): In this case the court is not satisfied that the circumstantial evidence is cogently or firmly established so as to draw an inference of guilt. They do not point irresistibly to the guilt of the accused. In the circumstances if the accused persons are called upon to make their defence and they elect to remain silent the court is not prepared to convict them on the evidence before the court. Accordingly, the court finds that no *prima facie* case has been made out and the three accused persons are hereby discharged and acquitted.

Jaafar bin Ali v Public Prosecutor

A

HIGH COURT (MELAKA) — CRIMINAL APPEAL NO 42-2 OF 1998
AUGUSTINE PAUL J
4 SEPTEMBER 1998

Criminal Procedure — Trial — Close of defence's case — Duty of court — Failure to comply with mandatory requirements — Whether there was misdirection on standard of proof — Whether misdirection capable of being cured — Whether court must review evidence adduced with regard to all the elements to be proved

B

Criminal Procedure — Judgment — Grounds of judgment in three parts — Effect of — Entitlement of accused to grounds of decision — Whether refers to entire ground or merely a part — Criminal Procedure Code (FMS Cap 6) s 307(3)

C

Evidence — Identification evidence — Application of Turnbull guidelines — General warning of the danger of identification evidence where reliability disputed — Effect of failure to warn

D

Evidence — Identification evidence — Poor quality of — Need for supporting evidence — No other evidence to connect accused to crime — Judge should direct acquittal

Evidence — Identification parade — Witness given opportunity to see accused prior to identification parade — Effect of

E

The accused was convicted under s 307 of the Penal Code (FMS Cap 45) for the attempted murder of one Noor Junizah bte Mokhri ('PW5') and sentenced to 10 years' imprisonment by the Sessions Court at Melaka. The accused appealed against the conviction and sentence. On the facts, PW5 had, on 12 July 1997 and prior to the holding of an identification parade, been taken to the Tiang Dua police station where she was shown the accused whom she identified as the person who strangled her. Subsequently on 14 July 1997, PW5 attended an identification parade at the Melaka police headquarters where she identified the accused through a one-way mirror. The police had shown her a photograph of the accused in her house after the identification parade in order to enable her to identify the accused correctly. She further identified the accused in court.

F

Counsel for the accused argued, inter alia, on appeal that the subsequent identification parade conducted by the police was irregular and although the learned judge had correctly rejected all identification evidence, he had still proceeded to convict the accused, contrary to the principles laid down in *Turnbull*. Counsel for the accused further contended that the learned sessions court judge did not refer to the prosecution evidence at the end of the case for the defence, thus not complying with s 173(m)(1) of the Criminal Procedure Code (FMS Cap 6) ('the CPC').

G

H

I

Held, quashing the conviction and sentence imposed:

- A (1) Where the primary issue is the identity of the accused, the principles set out in *Turnbull* must be followed. Identification of the accused by PW5 cannot be said as good within the meaning of *Turnbull* as PW5 failed to give any description of the accused to the police soon after the incident as evidence in support. Furthermore, the identification parade conducted by PW16 had absolutely no weight as PW5 had seen the accused at an earlier occasion in the police station. Thus the only proper identification that PW5 made of the accused was when he was in the dock. Since the quality of the identification of the accused by PW5 at the time of the commission of the offence was not good, it thus required supporting evidence which in this case was not available. Accordingly, there was no evidence on the identification of the accused (see pp 417B, 419H, 420H and 421C-F); *Chang Kim Siong v PP* [1968] MLJ 36; *Lai Ah Kam & Anor v R* [1939] MLJ 306 and *Chooi Kam Woh v R* [1954] MLJ 264 followed.
- B
- C
- D (2) The warning by the trial judge of the extent of the application of the *Turnbull* guidelines was insufficient. Although the learned judge had warned himself of the special need for caution, he had not instructed himself on the reason for the need for such warning and had not made any reference to the possibility that a mistaken witness can be a convincing one and that a witness can be quite honest and still be mistaken. A warning of this nature will ensure that the evidence adduced is viewed in its proper perspective (see p 420B-C).
- E
- F (3) The trial judge did not evaluate the evidence relating to the identification of the accused at the end of the whole case in order to determine whether they had been proved beyond reasonable doubt. Such evaluation had only been done at the end of the prosecution's case. He had therefore failed to comply with the mandatory requirements of s 173(m)(1) of the CPC with regard to the burden of proof on the prosecution (see p 424D-E); *Ishak bin Hj Shaari v PP* [1997] 5 MLJ 28; *Surandran all Rajaretnam v PP* [1998] 2 MLJ 49 and *Harun bin Abdullah v PP* [1998] 3 MLJ 1 followed.
- G

Obiter:

- H It is wrong in law to have the grounds of judgment written in three parts. All three parts of the judgment ought to be combined to form the grounds of judgment instead of leaving some parts in the notes of evidence (see p 424F-G).

I [Bahasa Malaysia summary]

Tertuduh telah disabitkan di bawah s 307 Kanun Keseksaan (NMB Bab 45) kerana cuba membunuh seorang bernama Noor Junizah bte Mokhri ('PW5') dan telah dijatuhkan hukuman pemenjaraan selama

10 tahun oleh Mahkamah Sesyen di Melaka. Tertuduh telah merayu terhadap sabitan dan hukuman itu. Berdasarkan fakta-fakta, PW5 telah, pada 12 Julai 1997 dan sebelum satu perbarisan cam diadakan, dibawa ke balai polis Tiang Dua di mana beliau telah ditunjukkan tertuduh yang mana beliau mengenalpasti merupakan orang yang telah mencekiknya. Kemudiannya pada 14 Julai 1997, PW5 telah menghadiri satu perbarisan cam di ibu pejabat polis Melaka di mana beliau telah mengenalpasti si tertuduh melalui cermin sehala. Pihak polis telah menunjukkan kepadanya gambar si tertuduh di rumahnya selepas perbarisan cam itu bagi membolehkan beliau mengenalpasti dengan lebih tepat lagi akan si tertuduh. Beliau selanjutnya mengenalpasti si tertuduh di mahkamah.

Peguam bagi pihak si tertuduh berhujah, antara lain, atas rayuan bahawa perbarisan cam kemudiannya yang telah dilakukan oleh pihak polis adalah di luar aturan dan walaupun hakim yang arif telah dengan betulnya menolak segala keterangan mengenalpasti, beliau masih mensabitkan si tertuduh, bercanggahan dengan prinsip-prinsip yang dibentangkan dalam *Turnbull*. Peguam bagi pihak tertuduh selanjutnya menghujahkan bahawa hakim mahkamah sesyen yang arif tidak merujuk kepada keterangan pendakwaan di penghujung kes bagi pembelaan, justeru itu tidak mematuhi s 173(m)(1) Kanun Acara Jenayah (NMB Bab 6) ('KAJ').

Diputuskan, membatalkan sabitan dan hukuman yang dikenakan:

- (1) Di mana isu utama merupakan identiti si tertuduh, prinsip-prinsip yang dibentangkan dalam *Turnbull* mestilah diikuti. Pengenalan si tertuduh oleh PW5 tidak boleh dikatakan wajar dalam maksud *Turnbull* kerana PW5 gagal untuk memberikan sebarang penerangan mengenai si tertuduh kepada polis sejourus selepas kejadian itu sebagai keterangan sokongan. Lagipun, perbarisan cam yang dikendalikan oleh PW16 tidak mempunyai sebarang kesan langsung kerana PW5 telah pun melihat si tertuduh pada masa yang lebih awal di balai polis. Dengan itu satu-satunya pengenalan wajar yang dilakukan oleh PW5 mengenai si tertuduh adalah ketika si tertuduh berada dalam kandang orang salah. Oleh kerana kualiti pengenalan si tertuduh oleh PW5 ketika melakukan kesalahan adalah tidak baik, dengan itu ia memerlukan keterangan sokongan yang mana tidak didapati dalam kes ini. Berikutan itu, tidak terdapat keterangan ke atas pengenalan si tertuduh tersebut (lihat ms 417B, 419H, 420H dan 421C-F); *Chang Kim Siong v PP* [1968] MLJ 36; *Lai Ah Kam & Anor v R* [1939] MLJ 306 dan *Chooi Kam Woh v R* [1954] MLJ 264 diikuti.
- (2) Amaran oleh hakim perbicaraan mengenai had pemakaian garis panduan *Turnbull* adalah tidak memadai. Walaupun hakim yang arif telah memberi amaran kepada dirinya sendiri mengenai keperluan untuk berhati-hati, beliau telah tidak mengarahkan dirinya mengenai alasan bagi perlunya berhati-hati dan telah

- A** tidak membuat sebarang rujukan kepada kemungkinan bahawa seseorang saksi yang salah boleh merupakan saksi yang meyakinkan dan bahawa seseorang saksi boleh bersikap jujur tetapi masih juga tersalah anggap. Amaran yang bersifat seperti ini akan memastikan bahawa keterangan yang dikemukakan dipandang dalam perspektif yang sewajarnya (lihat ms 420B–C).
- B** (3) Hakim perbicaraan telah tidak menilai keterangan berhubung dengan pengenalan si tertuduh di penghujung keseluruhan kes agar dapat menentukan sama ada mereka telah membuktikannya melampaui keraguan munasabah. Penilaian sedemikian telah hanya dilakukan di penghujung kes pendakwaan. Dengan itu
- C** beliau telah gagal untuk mematuhi keperluan mandatoris 175(m)(1) KAJ berhubung dengan beban membuktikan ke atas pihak pendakwaan (lihat ms 424D–E); *Ishak bin Hj Shaari v PP* [1997] 5 MLJ 28; *Surandran all Rajaretnam v PP* [1998] 2 MLJ 49 dan *Harun bin Abdullah v PP* [1998] 3 MLJ 1 diikuti.

D**Obiter:**

Adalah salah di sisi undang-undang untuk menulis alasan-alasan penghakiman dalam tiga bahagian. Ketiga-tiga bahagian penghakiman tersebut seharusnya disatukan untuk membentuk alasan penghakiman dan tidak membiarkan sebahagian dari alasan-alasan itu di dalam nota-nota keterangan tersebut (lihat ms 424F–G).]

E**Notes****F**

For cases on witness given opportunity to see accused prior to identification parade, see 7 *Malall's Digest* (4th Ed, 1995 Reissue) paras 1094–1095.

For cases on trials in criminal procedure see *Malall's Digest* (4th Ed, 1994 Reissue) paras 2828–3189.

G**Cases referred to**

A Ragunathan v Pendakwa Raya [1982] 1 MLJ 139 (distd)

Alexander v The Queen (1981) 145 CLR 395 (refd)

Arulpragasam all Sandaraju v PP [1997] 1 MLJ 1 (folld)

Arumugam slo Muthusamy v PP [1998] 3 MLJ 73 (refd)

H

Chang Kim Siong v PP [1968] 1 MLJ 36 (folld)

Chooi Kam Woh v R [1954] MLJ 264 (folld)

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232 (refd)

Davies v The King (1937) 57 CLR 170 (refd)

Domican v R (1992) 173 CLR 555 (refd)

I

Finn v R (1988) 34 A Crim R 425 (refd)

Grbic v Pitkethly (1992) 38 FCR 95 (refd)

Harun bin Abdullah v PP [1998] 3 MLJ 1 (folld)

Haw Tua Tau v PP [1981] 2 MLJ 49 (folld)

Ho Yew Cheng v R [1962] MLJ 437 (distd)

- Ishak bin Hj Shaari v PP* [1997] 5 MLJ 28 (folld) A
Kelleher v R (1974) 131 CLR 534 (refd)
Lai Ah Kam & Anor v R [1939] MLJ 306 (folld)
McShane v Northumbria Chief Constable (1980) 72 Cr App Rep 208 (refd)
Mezzo v R (1986) 4 WWR 577 (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232 (refd) B
Nembhard v The Queen (1981) 74 Cr App Rep 144 (refd)
Pavone v PP [1984] 1 MLJ 77 (refd)
PP v Amar Singh [1948-49] MLJ Supp 55 (refd)
R v Atfield (1983) 25 Alta LR (2d) 97 (refd)
R v Breslin (1984) 80 Cr App Rep 226 (refd) C
R v Browne and Angus (1951) 1 WWR 449 (refd)
R v Cape (1996) 1 Cr App Rep 191 (distsd)
R v Cartwright (1914) 10 Cr App Rep 219 (refd)
R v Chapman (1911) 7 Cr App R 53 (folld)
R v Courtneil [1990] Crim LR 115 (distsd)
R v De-Cressac [1985] 1 NSWLR 381 (refd) D
R v Dickson [1983] 1 VR 227 (refd)
R v Hunjan (1978) 68 Cr App Rep 99 (refd)
R v Keane (1977) 65 Cr App Rep 247 (refd)
R v Long (1973) 57 Cr App Rep 871 (refd)
R v McDonald (1951) 101 CCC 78 (refd) E
R v Power (1987) 67 Nfld & PEIR 272 (refd)
R v Preston [1961] VR 761 (refd)
R v Smith & Evans (1908) 1 Cr App Rep 203 (folld)
R v Turnbull & Ors [1976] 3 All ER 549 (folld)
R v Weeder (1980) 71 Cr App Rep 228 (refd)
Rangapula & Anor v PP [1982] 1 MLJ 91 (refd) F
Reid (Junior) v The Queen [1990] 1 AC 363 (refd)
Sharret v Gill (1993) 65 A Crim R 44 (refd)
Smith v The Queen (1990) 64 ALJR 588 (refd)
ST Shinde v State of Maharashtra AIR 1974 SC 791 (refd)
Surandran all Rajaretnam v PP [1998] 2 MLJ 49 (folld) G
Yau Heng Fang v PP [1985] 2 MLJ 335 (refd)

Legislation referred to

- Criminal Procedure Code (FMS Cap 6) ss 173(f)(1), (2), (h)(1), (m)(1), (2), (3), 182(m)(2), 182A(2), 307(3) H
 Evidence Act 1950 s 9

A Rengganathan (A Rengganathan & Co) for the appellant.
Anslem Charles Fernandis (Deputy Public Prosecutor) for the respondent.

Augustine Paul J: The accused was convicted under s 307 of the Penal Code for the attempted murder of one Noor Junizah bte Mokhri ('PW5') and sentenced to 10 years' imprisonment by the Sessions Court at Melaka. This appeal is by the accused against the conviction and sentence. I

A THE FACTS OF THE CASE

On 5 May 1997 at about 6.45 pm, PW5, aged 11, went to a provision shop near her house to look for her sister. On arrival at the shop, she saw a male person (the accused) seated on a red motor cycle. The colour of the motor cycle was confirmed by PW7 and PW9. PW5 said that the accused was wearing a black jacket and a crash helmet. She was not sure of the colour of his trousers. She started playing with her sister and friends. The accused then asked her to follow him to look for 20 cents that Nurul Suhana, one of the children she was playing with, had lost. She rode pillion on his motor cycle for about 15 minutes to a rubber plantation. The accused stopped at the side of the plantation near a road. PW5 alighted from the motor cycle. The accused then removed his crash helmet. He was about 10 feet away from her. She said that she could see his face clearly though it was a bit dark. He then showed her photographs of women in bikini. At that time, he was about three feet away from her and she said that again she saw his face clearly. She noticed that his hair was short, he had some pimples on his face and he was thin. After about five to ten minutes, he began to strangle her neck. At that time, he was about one and a half feet away from her. She said that she could see his face clearly at that time also. She then became unconscious and regained consciousness in the morning at the same place. She heard the sound of a motorcycle but had no voice to call for help. Two persons, Osman and Marshad who were on the motorcycle, helped her. While Marshad stayed with her, Osman went to call her mother. She was then taken to a clinic and later to the hospital. She was warded for 25 days. On 12 July 1997, she went to Tiang Dua police station where she met Sjn Amat Kaslar ('PW13'). He showed her two persons who were in a room. She identified the accused as the person who strangled her. On 14 July 1997, she attended an identification parade conducted by Inspector Arikrishnan ('PW16') at the Melaka police headquarters. There were about 10 persons in the parade. She identified the accused. In cross-examination, she said that she had not seen the accused prior to the incident. She was shown a photograph of the accused in her house by the police. It was shown to her after the identification parade in order to enable her to identify the accused correctly. She also added that she could identify the accused even without the photograph. She identified the accused in court.

Dr Loke Tien Hsi ('PW8') examined PW5 in the hospital on 6 May 1997. He said that she had bruises around both her eyes, a 2-cm laceration underneath the left jaw, bruises around the neck area and abrasions on her left shoulder. She was very upset and weak and was crying. But she was able to describe what happened to her. Inspector Hadi bin Osman ('PW18'), the investigation officer, said that he visited PW5 in hospital on 14 May 1997. He asked her for a description of the person who had attacked her. At that time, she was still frightened and did not give him any description. He added that till todate she had not given him any description of the person. PW13 said that he arrested the accused on 12 July 1997 and took PW5 to the police station at Tiang Dua to identify the accused. The accused was in a room with a policeman. PW13 asked her whether she

could identify the thin man in the room. She said that she could identify him as the accused. PW16 said that he conducted the identification parade on 14 July 1997 at the Melaka police headquarters. He used 10 persons in the parade. All were male Malays aged 20 except for one who was aged 19. All of them were of the same build as the accused and wore similar clothes. The accused was placed in the eighth position. He did not object. When the participants were ready, PW16 asked for PW5 to be brought in. As she was frightened, she was asked to see the participants through a one-way mirror. She identified the accused through the mirror without any difficulty.

THE GROUNDS OF JUDGMENT

The grounds of judgment of the learned sessions court judge is in three parts. The first part containing the reasons for holding that there is a prima facie case is part of the notes of evidence. The second part with the heading 'Alasan Penghakiman' deals with the defence of the accused. The third part, dealing with the reasons for the imposition of the sentence, is also part of the notes of evidence. I shall comment on this method of preparing the grounds of judgment in a later part of the judgment.

In the first part of the judgment, the learned sessions court judge said that the issue of identification of the accused was of prime importance in this case. He referred to the guidelines laid down in the celebrated case of *R v Turnbull & Ors* [1976] 3 All ER 549. In assessing the quality of the identification evidence, he narrated the sequence of events that took place till the time of the strangulation and said:

The victim had the accused under observation for at least 30 minutes.

He said that PW5 had a clear look at the face and physique of the accused. Although it was getting dark, the light was sufficient for her to look at the features of the accused. He referred to the removal of the crash helmet by the accused to show that PW5's observation was not impeded. He then posed this question:

Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by her and his actual appearance?

And answered it this way:

The investigation officer stated that he visited the victim in hospital on 14 May 1997 and attempted to get a description of the assailant from her. But she was too frightened to give him any description.

He then proceeded to say:

In conclusion, in assessing the quality of identification evidence, I have warned myself of the special need for caution. As stated above, this is not a case where the victim had a brief fleeting view of the side of the accused's face at night, as was the case in *Turnbull* — see p 556. This is a case, where the victim had a good look at the face of the accused, at very close quarters in sufficient light.

A The fact that the victim did not give a description of her attacker to the police did not mean that she could not remember the face of the attacker. How could she forget? Her mind would have been playing back the vicious attack repeatedly. She could not give any description of the attacker, when the investigating officer visited her some nine days after the attack, as she was suffering from trauma from day one of admission, as confirmed by the medical evidence. The point is she had ample opportunity to mark the face and features of the accused. It is quite natural that her impression had become quite vividly sketched on her mind and was able to identify the accused subsequently... .

B

C Hence, for the reasons given above, I find that the quality of the identification evidence given by the victim is good at the end of the case for the prosecution and as such the need for other supporting evidence does not arise.

He then said:

D It is trite law that where the victim did not know the accused before the incident it is incumbent that an identification parade is held. The object of an identification parade is to make sure that the ability of the witness to recognize the suspect has been fairly and adequately tested. In this regard, the witness should be prevented from seeing the suspect before he is paraded with other persons. See *Sarkar on Evidence* (14th Ed, 1993) p 181.

E Thus, he said, the identification conducted by PW13 had ‘... now prejudiced the investigation of the case’. He said that this had vitiated the identification parade conducted by PW16 on 12 July 1997. He said that dock identification done for the first time in court is inherently weak. In the second part of his judgment, he considered the defence of alibi advanced by the accused and said that it is completely false and fabricated. In the concluding part of his judgment, he said:

F As stated at the outset, the burden of proof as to the guilt of the accused always remains on the prosecution. In this regard, the new s 182A(iii) of the Criminal Procedure Code states inter alia:

G ‘If the court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted thereon.’

In accordance with the legal principles stated above, it is the finding of this court that the prosecution has proved its case beyond reasonable doubt and the accused is found guilty on the offence as charged and is convicted thereon.

H THE GROUNDS OF APPEAL

In his submission, learned counsel for the accused said that his grounds of appeal will be confined to the following two issues:

- I**
- (a) evidence of identification; and
 - (b) non-compliance with s 173(m)(1) of the Criminal Procedure Code.

I shall consider both the issues separately.

Evidence of identification

The submissions of the parties

Learned counsel for the accused said that the accused was not known to PW5 prior to the incident. He said that PW5 did not give any description of the accused to the police or any other person. He added that the subsequent identification conducted by the police was irregular and though the learned sessions court judge had correctly rejected all such evidence, he still proceeded to convict the accused. This finding, he contended, is wrong in law as it is against the principles laid down in *Turnbull*. In his reply, the learned deputy public prosecutor conceded that the identification parade which was held was defective as the accused had been shown to PW5 prior to the holding of the parade. He said that the learned sessions court judge had followed the guidelines laid down in *Turnbull* correctly and had given himself the required caution. In such circumstances, he said, the failure to hold a proper identification is not fatal.

The law

Pre-trial identification of suspected offenders are complemented by judicial guidelines concerning the appraisal of identification evidence at the trial itself (see *Criminal Evidence* (3rd Ed) by Andrews & Hirst at p 336). These guidelines were enunciated by the Court of Appeal in *Turnbull* as a result of criticism of the existing law under which no specific duty was imposed on judges to warn juries against the proven dangers of mistaken identification evidence (see *R v Long* (1973) 57 Cr App Rep 871). The *Turnbull* guidelines have been accepted in Canada (see *Mezzo v R* (1986) 4 WWR 577); in Australia (see *Kelleher v R* (1974) 131 CLR 534); and in Malaysia (see *Rangapula & Anor v PP* [1982] 1 MLJ 91; *Dato Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232; *Yau Heng Fang v PP* [1985] 2 MLJ 335; *Arumugam s/o Muthusamy v PP* [1998] 3 MLJ 73). These guidelines, which appear in the judgment of Lord Widgery CJ in *Turnbull*, deal with four issues. In elaborating on these issues, I can do no better than reproduce the work of Andrews & Hirst from pp 338–339 where the learned authors have admirably re-arranged certain paragraphs of the judgment to explain them. They are as follows:

(a) *The need for the judge to warn the jury about the dangers of identification evidence*

First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence allege to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance upon the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning, and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms, the judge need not use any particular form of words. Recognition may be more reliable than identification of a

A stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made, ... (at pp 551–552).

(b) The need for him to direct the jury to examine various specific matters that may affect the strength or cogency of the evidence before them

B Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy, they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases, if the accused asks to be given particulars of such description, the prosecution should supply them. Finally, he should remind the jury of any specific weakness which had appeared in the identification evidence.

E All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger (at p 552).

(c) The question of when a jury may properly be allowed by the judge to convict the accused even in the absence of other evidence supporting the crucial identification

F In our judgment, when the quality [of identification] is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence, even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution. Were the courts to adjudge otherwise, affronts to justice would frequently occur ...

H When in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification (at pp 552, 553).

(d) The question of what other evidence may properly be regarded as capable of supporting an identification

I This [supporting evidence] may be corroboration in the sense lawyers use the word, but it need not be so if its effect is to make the jury sure that there has been no mistake in the identification. For example, X sees the accused: he gets only a fleeting glance of the thief's face as he runs off, but he does see him entering a nearby house. Later he picks out the accused on an identity parade. If there was no more evidence than this, the poor quality of

the identification would require the judge to withdraw the case from the jury: but this would not be so if there was evidence that the house into which the accused was alleged by X to have run was his father's. Another example of supporting evidence not amounting to corroboration in a technical sense is to be found in *R v Long* (1973) 57 Cr App Rep 871. The accused, who was charged with robbery, had been identified by three witnesses in different places on different occasions, but each had only a momentary opportunity for observation. Immediately after the robbery, the accused had left his home and could not be found by the police. When later he was seen by them, he claimed to know who had done the robbery and offered to help to find the robbers. At his trial, he put forward an alibi which the jury rejected. It was an odd coincidence that the witnesses should have identified a man who had behaved in this way. In our judgment, odd coincidences can, if unexplained, be supporting evidence.

The trial judge should identify to the jury the evidence which he adjudges is capable of supporting evidence of identification. If there is any evidence or circumstances which the jury might think was supporting when it did not have this quality, the judge should say so. A jury, for example, might think that support for identification evidence could be found in the fact that the accused had not given evidence before them. An accused's absence from the witness box cannot provide evidence of anything, and the judge should tell the jury so. But he would be entitled to tell them that when assessing the quality of the identification evidence, they could take into consideration the fact that it was uncontradicted by any evidence coming from the accused himself.

Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on, may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only where the jury are satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward, that fabrication can provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was (at pp 553-554).

A brief comment on the *Turnbull* guidelines may be of relevance. In *R v Keane* (1977) 65 Cr App Rep 247, it was held that there was flexibility in the application of the guidelines. This was repeated by the Privy Council in *Nembhard v The Queen* (1981) 74 Cr App Rep 144 in the following words:

Turnbull does not purport to change the law. It provides a most valuable analysis of the various circumstances which common sense suggests or experience has shown may affect the reliability of a witness's evidence of identification and make it too dangerous in some of the circumstances postulated to base a conviction on such evidence unless it is supported by other evidence that points to the defendant's guilt. *Turnbull* sets out what the judgment itself described as 'guidelines for trial judges' who are obliged to direct juries in such cases. But those guidelines are not intended as an elaborate specification to be adopted religiously on every occasion. A

- A summing up, if it is to be helpful to the jury should be tailored to fit the facts of the particular case and not merely taken ready-made 'off the peg'.

However, it has been emphasized that where the primary issue is the identity of the accused, the principles set out in *Turnbull* must be followed (see *McShane v Northumbria Chief Constable* (1980) 72 Cr App Rep 208; *R v Hunjan* (1978) 68 Cr App Rep 99; *R v Weeder* (1980) 71 Cr App Rep 228; *R v Breslin* (1984) 80 Cr App Rep 226). They apply to non-jury as well as jury trials (see *Grbic v Pitkethly* (1992) 38 FCR 95; *Sharret v Gill* (1993) 65 A Crim R 44; *Arumugam s/o Muthusamy v PP* [1998] 3 MLJ 73). Thus they would apply in this case. Whatever the defence and however the case is conducted, where evidence as to identification represents any significant part of the proof of guilt of an offence, the judge must warn the jury as to the dangers of convicting on such evidence where its reliability is disputed (see *Domican v R* (1992) 173 CLR 555). The terms of the warning need not follow any particular formula (see *R v De-Cressac* (1985) 1 NSWLR 381; *Finn v R* (1988) 34 A Crim R 425). But it must be cogent and effective (see *R v Dickson* [1983] 1 VR 227; *Reid (Junior) v The Queen* [1990] 1 AC 363). A warning in general terms is not sufficient (*Kelleher v R* (1974) 131 CLR 534). The warning must be appropriate to the circumstances of the particular case (see *Smith v The Queen* (1990) 64 ALJR 588). Failure to warn of the dangers of identity evidence may lead to the ordering of new trials or the quashing of convictions (see *R v Preston* [1961] VR 761; *Domican v R* (1992) 173 CLR 555; *R v Keane* (1977) 65 Cr App R 247). On the sort of warning that must be given, useful reference may be made to *Domican v R* (1992) 173 CLR 555 where the majority said at p 565:

- F The adequacy of a warning in an identification case must be evaluated in the context of the evidence in the case. But its adequacy is evaluated by reference to the identification evidence and not the other evidence in the case. The adequacy of the warning has to be evaluated by reference to the nature of the relationship between the witness and the person identified, the opportunity to observe the person subsequently identified, the length of time between the incident and the identification, and the nature and circumstances of the first identification — not by reference to other evidence which implicates the accused. A trial judge is not absolved from his or her duty to give general and specific warnings concerning the danger of convicting on identification evidence because there is other evidence, which, if accepted, is sufficient to convict the accused. The judge must direct the jury on the assumption that they may decide to convict solely on the basis of the identification evidence.
- G
- H

The quality of the identification evidence that is required includes a description of the accused that the identifying witness must have given to the police. The need for such description is implicit in *Turnbull* itself and has been stressed in cases such as *R v Atfield* (1983) 25 Alta LR (2d) 97; *R v Power* (1987) 67 Nfld & PEIR 272 and *PP v Amar Singh* [1948–49] MLJ Supp 55. In my opinion, it is necessary for an identifying witness to give a description of the accused especially in cases where the accused was not known to the witness prior to the incident. It may not be necessary where there is other supporting evidence on the identification of the

accused and when the accused is well known to the witness. The object of a description of the accused is explained by Deutscher and Leonoff in their book entitled *Identification Evidence* in the following words at pp 111-112: A

This preserves the original memory in as accurate a form as possible. The original description can then be cross-checked with the description given by other witnesses, with the actual appearance of the accused, and with the description given at trial. Variations between the original description and that given at trial may be as a result of the numerous psychological factors that tend to distort memory over time. B

When the quality of the identification evidence is good as described in *Turnbull*, it is sufficient even though there is no other evidence to support it provided that an adequate warning is given. When the quality is poor, as for example it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the accused shall be acquitted unless there is other evidence to support the correctness of the identification (see *R v McDonald* (1951) 101 CCC 78). In the absence of such other evidence, the fact that the accused was picked out at an identification parade makes no difference to the order to be made. C D

There have been many cases of wrongful convictions based on mistaken eyewitness identification. It has been held that evidence as to identity based on personal impressions, however bona fide, is perhaps of all classes of evidence the least to be relied upon, and therefore, unless supported by other facts, an unsafe basis for the verdict (see *R v McDonald*). Thus, it has long been recognized that witnesses should be asked to identify a suspect or an accused at the earliest opportunity and under the fairest of circumstances (see *R v Cartwright* (1914) 10 Cr App Rep 219; *Davies v The King* (1937) 57 CLR 170; *R v Browne and Angus* (1951) 99 1 WWR 449). Evidence given by a witness identifying an accused as the person whom he saw at the scene of the crime or in circumstances connected with the crime will generally be of very little value if the witness has not seen the accused since the events in question and is asked to identify him for the first time in the dock, at least when the witness has not, by reason of previous knowledge or association, become familiar with the appearance of the accused. Gibbs CJ, having said that in *Alexander v The Queen* (1981) 145 CLR 395 added at p 400: E F G

However, as a matter of legal principle, it seems to me impossible to say that the admissibility of evidence of a prior act of identification depends on the fact that an identification parade was held. H

Chong Siew Fai CJ (Sabah & Sarawak) in speaking for the Federal Court in *Arumugam s/o Muthusamy v PP* [1998] 3 MLJ 73 said at p 75: I

Generally speaking, however, a dock identification in the sense as described above, ie identification of an accused for the first time in court at the trial, is undesirable, and it would be a good practice to hold an identification parade, which, if it turns out to be positive, would tend to strengthen the case for the prosecution. But to hold that an identification parade must, in all circumstances, be conducted in order to sustain a conviction would be too stringent. There may well be situations where an identification parade

- A cannot or need not be held, for example, where the attendance of the witness at the parade is physically impossible or impracticable or there are exceptional circumstances.

On the instances when an identification parade is required, Andrews & Hirst say this at p 321:

- B It is necessary to distinguish between cases in which the accuracy of a purported identification is in issue, and cases in which the only issue is whether identifying witnesses are lying. In the former kind of case, much will turn upon the reliability or pre-trial identification, and a failure to follow proper procedures in respect of such identification may well lead to the court or judge excluding the evidence concerning it. It will also be essential, in most cases, for the judge to direct the jury on the dangers of mistaken identification, in accordance with the procedures prescribed by the Court of Appeal in *R v Turnbull* [1976] 3 All ER 549.
- C

Where, in contrast, the veracity of the witness is the only issue, it will not generally be either necessary or appropriate for the identification parade to be held or for a *Turnbull* direction to be given.

- D Thus, in *R v Courtneil* [1990] Crim LR 115, the appellant was identified by a publican as the man who had robbed him of his takings. There was no identification parade; at a confrontation the publican claimed to recognize him as a regular customer over the previous week; the appellant alleged in reply that he was being 'stitched up', and subsequently ran a defence alleging that the case against him was a total fabrication. He was convicted, and appealed on the ground that no *Turnbull* direction had been given at the trial but the Court of Appeal held that none was required. In *R v Cape* (1996) 1 Cr App Rep 191, it was held that in a case where the witness knew the accused well and the latter's sole defence was one of malicious fabrication by the witness no useful purpose could have been served by the giving of a *Turnbull* warning. When the accused is caught red-handed, there is no need for an identification parade (see *Ho Yew Cheng v R* [1962] MLJ 437). The evidence of identification parade is admissible under s 9 of the Evidence Act 1950 (see *ST Shinde v State of Maharashtra* AIR 1974 SC 791).
- E
- F
- G

The findings of the court

- H On the relevant facts of this case, to which I shall refer shortly, it cannot be said that the identification of the accused by PW5 was good within the meaning of *Turnbull*. Her evidence therefore requires to be supported. It is necessary to comply with the *Turnbull* guidelines as the primary issue involved is the identity of the accused which depends on the accuracy of the evidence of PW5. This warrants a consideration of the extent to which the learned sessions court judge has applied the guidelines. With regard to the required warning he merely said:

- I In conclusion, in assessing the quality of identification evidence, I have warned myself of the special need for caution. As stated above, this is not a case where the victim had a brief fleeting view of the side of the accused's face at night, as was the case in *Turnbull* — see p 556. This is a case where

the victim had a good hard look at the face of the accused at very close quarters in sufficient light.

The warning is general in nature and is not effective enough to reflect the requirements of the *Turnbull* guidelines. It refers to only one aspect of the warning that the learned sessions court judge has to give himself, that is to say, the need for caution before convicting the accused in reliance upon the correctness of the identification. He has not instructed himself on the reason for the need for such warning and has not made any reference to the possibility that a mistaken witness can be a convincing one and that a witness may be quite honest and still be mistaken. A warning of this nature will ensure that the evidence adduced is viewed in its proper perspective. It is therefore my view that the warning given by the learned sessions court judge is not sufficient.

A further defect in the identification evidence is that the police did not get a description of the accused from PW5 prior to his dock identification. On this issue, the learned sessions court judge said:

The fact that the victim did not give a description of her attacker to the police did not mean that she could not remember the face of the attacker. How could she forget. Her mind would have been playing back the vicious attack repeatedly.

... The point is she had ample opportunity to mark the face and features of the accused. It is quite natural that her impression had become quite vividly sketched on her mind and she was able to identify the accused subsequently.

This finding is not based on the evidence adduced but on mere speculation. In any event, the view expressed by the learned sessions court judge overlooks the fundamental object of obtaining a description of the accused from the witness which is to cross check the subsequent identification of the accused with the description. This will assist in eliminating an objection based on mistaken identification. The absence of a pre-trial description of the accused will reduce the value of identification in an identification parade and subsequent identification in court. There can be no dispute that a description given will enhance the value of such evidence. It is my view that the learned sessions court judge has discounted the lack of description of the accused by PW5 on wrong principles. In my opinion, the absence of such description is prejudicial to the prosecution on the facts of this case as the accused was not known to PW5 prior to the incident. I interpolate to add that the description of the accused given by PW5 at the trial has no value.

The identification parade conducted by PW16 has absolutely no weight as PW5 had seen the accused at an earlier occasion in the police station. On the vitiating effect of identification parade evidence where the witness had the opportunity to see the accused at an earlier occasion, see cases such as *Chang Kim Siong v PP* [1968] 1 MLJ 36; *Lai Ah Kam & Anor v R* [1939] MLJ 306 and *Chooi Kam Woh v R* [1954] MLJ 264. The earlier identification amounts to what is referred to as a 'confrontation'. It refers to any situation where an accused was singled out to a witness as in this case where the accused was literally shown to PW5. The evidence obtained

A from such a procedure has no value (see *R v Smith and Evans* (1908) 1 Cr App Rep 203; *R v Chapman* (1911) 7 Cr App Rep 53; *R v Keane* (1977) 65 Cr App Rep 247). Even the assessment of the identification evidence of PW5 by the learned sessions court judge is defective. He made an attempt to analyse her evidence in some detail. However, his finding that PW5 had the accused '... under observation for at least 30 minutes' weakens his analysis. In her own testimony, PW5 said that, she saw the accused's face for only about five to ten minutes. Prior to that, she was riding pillion on his motor cycle. Subsequent to that she was undergoing the trauma of being strangled. To say therefore that she had the accused 'under observation' for the whole period she was with him shows a misappreciation of the facts of the case.

C Thus the only proper identification that PW5 made of the accused was when he was in the dock. This method of identification would have value only if the quality of the identification of the accused by PW5 at the time of the commission of the offence was good. PW5 saw the accused only for about five to ten minutes. During that time she was shown pictures of women in bikinis followed by the attempt to strangle her. The fact that there were bruises around her eyes shows that PW5 could not have observed the accused well at that time. It cannot therefore be said that PW5 had the accused 'under observation' even for the full period that the accused had removed his crash helmet. The quality of her identification evidence of the accused cannot therefore be said to be good as described in *Turnbull*. It thus requires supporting evidence. However, with regard to the required evidence in support, she failed to give any description of the accused to the police soon after the incident. Neither was the identification parade conducted of any value as PW5 had seen the accused prior to that.

D

E

F Thus the dock identification of the accused conducted in such circumstances has no value. Accordingly, there was no evidence on the identification of the accused.

Non-compliance with s 173(m)(1) of the Criminal Procedure Code

G The submissions of the parties

Learned counsel for the accused said that the learned sessions court judge did not refer to the prosecution evidence at the end of the case for the defence. He referred to the second part of the grounds of judgment where the learned sessions court judge said at p 85 of the appeal record:

H I have already given my reasons for calling the defence of the accused. Now, I will proceed to consider the defence put forth.

I He also cited the learned sessions court judge's reference to s 182A(2) of the Criminal Procedure Code ('the Code') which is applicable to trials in the High Court and his mere finding that the prosecution had proved its case beyond reasonable doubt. In his reply, the learned deputy public prosecutor, acknowledging that the learned sessions court judge's reference to s 182(m)(2) of the Code was wrong, said that it is not necessary to expressly state that s 173(m)(1) of the Code has been complied with. He

added that a reading of the judgment as a whole indicates that the learned sessions court judge has considered the prosecution case in the light of the case for the defence.

The law

This issue requires a consideration of the duty of the court in assessing the evidence adduced at the close of the case for the prosecution and at the end of the whole case. This brings into focus s 173(f), (h) and (m) of the Code which read as follows:

- (f)(1) When the case for the prosecution is concluded the Court shall consider whether the prosecution has made out a prima facie case against the accused.
- (2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.
- (h)(1) If the Court finds that a prima facie case has been made out against the accused on the offence charged, the Court shall call upon the accused to enter on his defence.
- (m)(1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
- (2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted thereon and the Court shall pass sentence according to law.
- (3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

The duty of the court at the end of the case for the prosecution and at the end of the whole case is, as envisaged in the sections that I have referred to, explained in *Haw Tua Tau v PP* [1981] 2 MLJ 49 at pp 51–52. The duty is neatly summarized by Edgar Joseph Jr FCJ in *Arulpragasam all Sandaraju v PP* [1997] 1 MLJ 1 at pp 40–41 in the following terms:

The starting point for the discussion as to what is required to establish a 'prima facie case' is the Australian case of *May v O'Sullivan* (1955) 92 CLR 654, where the full High Court (Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ) said, inter alia, this (at pp 657–658):

'When, at the close of the case for the prosecution, a submission is made that there is 'no case to answer', the question to be decided is not whether on the evidence as it stands the defendant *ought* to be convicted, but whether on the evidence as it stands he *could* lawfully be convicted. This is really a question of law ... After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact ... A magistrate who has decided that there is a 'case to answer' may quite consistently, if no evidence is called for the defendant, refuse to convict on the evidence

- A for the prosecution. The prosecution may have made 'a prima facie case', but it does not follow that in the absence of a 'satisfactory answer' the defendant should be convicted'

The second case is *Considine v Lemmer* (1971) SASR 39, where Bright J, correctly paraphrasing *May v O'Sullivan* said this (at p 51):

- B 'I agree that a prima facie case, uncontradicted by credible evidence, does not lead automatically to conviction. For the prima facie case may do not more than tend to prove guilt: it may or may not, if unexplained, satisfy beyond reasonable doubt. It may contain weaknesses which inspire doubt. To say this is to do no more than paraphrase *May v O'Sullivan*.'

- C The third case is *Zanetti v Hill* (1962) 108 CLR 433 at p 442 where Kitto J expounded the issue at hand, by stating:

- D '... that is to say, there is with respect to every element of the offence some evidence which, if accepted, would either prove the element directly or enable its existence to be inferred. That is a question to be carefully distinguished from the question of fact for ultimate decision, namely whether every element of the offence is established to the satisfaction of the tribunal of fact beyond a reasonable doubt.'

Thus what the court has to decide at the close of the case for the prosecution is to determine as a question of law whether on the evidence adduced the accused could lawfully be convicted, that is to say, whether there is with respect to every element in the charge some evidence which, if accepted, would either prove the element directly or enable its existence to be reasonably inferred. It must be distinguished from the question of fact for ultimate decision, which is whether on the evidence as a whole the prosecution has proved to the satisfaction of the court, as a tribunal of fact, that the accused is guilty as charged (see *A Ragunathan v Pendakwa Raya* [1982] 1 MLJ 139). It follows that in calling upon the accused to enter his defence the court must keep an open mind as to the accuracy of the prosecution evidence until the defence evidence has been tendered. At the close of the case for the defence and submissions, the court must review the evidence adduced with regard to all the elements to be proved and then decide whether the prosecution has proved the case against the accused beyond reasonable doubt. As Edgar Joseph Jr J (as he then was) said in *Pavone v PP* [1984] 1 MLJ 77 at pp 78-79:

- H ... It is implicit in the observation that the learned President had determined the issue of the veracity and accuracy of recollection of the witnesses for the prosecution before she called upon the defence. This was clearly wrong as it amounted to a provisional verdict of guilty thus raising the question whether the appellant was deprived of the substance of a fair trial, a matter of the first importance in the administration of criminal justice in any country following a Common Law system.

- I Now, the sole question at the close of the case for the prosecution is whether or not a prima facie case has been made out, that is to say, whether there is some evidence (not inherently incredible) which, if believed, establishes the essential elements of the offence charged. If there is such evidence, then the defence must be called but care must be taken to leave suspended the question of the veracity and accuracy of recollection of witnesses until after the close of the case for the defence. This applies even

where, as here, the defence elects to remain silent and calls no evidence. Consequently, in a proper case, there is nothing illegal in a magistrate or a President, or a judge sitting alone or with assessors, calling for the defence upon prima facie evidence being adduced and then proceeding to acquit and discharge even when the accused elects to remain silent and to call no evidence if not satisfied that the charge has been established by the prosecution beyond all reasonable doubt.

Failure to comply with these mandatory requirements would amount to a misdirection on the burden of proof which is not curable (see *Ishak bin Hj Shaari v PP* [1997] 5 MLJ 28; *Surandran all Rajaretnam v PP* [1998] 2 MLJ 49; *Harun bin Abdullah v PP* [1998] 3 MLJ 1).

The findings of the court

The only evidence that the learned sessions court judge evaluated at the end of the whole case was the evidence relating to the defence of alibi. With regard to the elements to be proved by the prosecution, in particular, the evidence relating to the identification of the accused, the evaluation done by him was only at the end of the case for the prosecution to rule that a prima facie case had been made out. He did not evaluate them at the end of the whole case in order to determine whether they had been proved beyond reasonable doubt. His mere finding at the end of the case for the defence that the prosecution has proved its case beyond reasonable doubt is, in my opinion, insufficient to show that there has been an evaluation on the accuracy and veracity of the evidence as required. He has therefore failed to comply with the mandatory requirements of the Code with regard to the burden of proof on the prosecution. This defect is not curable.

It is my view that the learned sessions court judge fell into this error by having his grounds of judgment in three parts. Quite apart from contributing to the error made by him, it is also wrong in law to have grounds of judgment written in that manner. All three parts of the judgment ought to have been combined to form the grounds of judgment instead of leaving some parts in the notes of evidence. An appellant is entitled to a signed copy of the grounds of decision in accordance with s 307(3) of the Code. This, to my mind, refers to the entire grounds and not merely to a part. This is necessary to enable the appellant to file his petition of appeal within the prescribed time. He would be unable to do so if certain parts of the judgment are contained in the notes of evidence for which he had not applied and, as a result, not supplied to him.

In the light of the views that I have expressed, the conviction and sentence of the accused cannot be sustained. Accordingly, I quash the conviction and sentence imposed on him and order that he be acquitted and discharged.

Accused acquitted and discharged.

Reported by Andrew Christopher Simon

TAB M

[R v Turnbull and others \[1976\] 3 All ER 549](#)

COURT OF APPEAL, CRIMINAL DIVISION

LORD WIDGERY CJ, ROSKILL, LAWTON LJ, CUSACK AND MAY JJ

6, 7, 9 JULY 1976

G F R Harkins for Turnbull.

Denis Orde for Camelo.

John Mathew and M R Bell for the Crown.

M R Selfe for Roberts.

John Mathew and A M Donne for the Crown.

Ronald Grey and H W Allardyce for Whitby.

John Mathew and R G Hawkins for the Crown.

Criminal evidence — Identity — Visual identification — Possibility of mistaken identification — Direction to jury — Caution against relying on identification — Supporting evidence — Desirable that judge should identify supporting evidence for jury — Case to be withdrawn from jury when identification unsupported.

Criminal law — Court of Appeal — Jurisdiction — Accused convicted after visual identification — Accused disputing identification — Whether Court of Appeal having jurisdiction to retry case — Circumstances in which Court of Appeal will interfere with jury's findings.

Whenever the case of an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification. He should instruct them as to the reason for that warning and should make some reference to the possibility that a mistaken witness could be a convincing one and that a number of witnesses could all be mistaken. Provided that the warning is in clear terms, no particular words need be used. Furthermore, the judge should direct the

jury to examine closely the circumstances in which the identification by each witness came to be made. If in any case, whether being dealt with summarily or on indictment, the prosecution have reason to believe that there is a material discrepancy between the description of the accused given to the police by the witness when first seen and his actual appearance, they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases, if the accused asks to be given particulars of any description, the prosecution should supply them. Finally, the judge

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should remind the jury of any specific weaknesses which have appeared in the identification evidence (see p 551 *j* to p 552 *d*, post).

Where the quality of an identification is good, the jury can safely be left to assess the value of the identifying evidence even if there is no other evidence in support, provided always that an adequate warning has been given about the special need for caution. However, where in the opinion of the judge the quality of the identifying evidence is poor, he should withdraw the case from the jury and direct an acquittal unless there is other evidence which supports the correctness of the identification. That other evidence may be either corroboration in the legal sense or something which convinces the jury that the identification is not mistaken; any odd coincidence, if unexplained, may be supporting evidence. The judge should identify to the jury any evidence which he adjudges capable of supporting the evidence of identification and he should tell the jury if there is any evidence or circumstances which cannot support an identification (see p 552 *e* and *f* and p 553 *c* and *f*, post).

The judge should tell the jury that the absence of the accused from the witness box cannot provide evidence of anything, although they may take into consideration the fact that identification evidence has not been contradicted by the accused. The judge should take care in directing the jury about the support for an

identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons and it is only when the jury are satisfied that the sole reason for fabrication of an alibi was to deceive them, that fabrication can support identification evidence. The judge should remind the jury that proof that the accused has lied about his whereabouts at the material time does not prove that he was where the identifying witness says he was (see p 553 f to j, post).

A failure to follow these guidelines is likely to result in a conviction being quashed, and will so result if, in the judgment of the Court of Appeal, on all the evidence, the verdict is either unsatisfactory or unsafe. However, the Court of Appeal has no jurisdiction to retry a case; it is for the jury in each case to decide which witnesses should be believed. The Court of Appeal will only interfere on matters of credibility if (1) the jury have been misdirected as to how to assess the evidence, (2) there has been no direction at all when there should have been one or (3) on the whole of the evidence, the jury must have taken a perverse view of a witness (see p 554 c to e, post).

Note

For identification in criminal cases, see 11 *Halsbury's Laws* (4th Edn) para 363.

Cases referred to in judgment

R v Long (1973) 57 Cr App Rep 871, CA, *Digest* (Cont Vol D) 170, 3309fb.

Appeals and application

R v Turnbull R v Camelo

On 13 October 1975 in the Crown Court at Newcastle-upon-Tyne before his Honour Judge Smith QC the appellants, Raymond Turnbull and Joseph Nicholas David Camelo, were jointly convicted after a retrial of conspiracy to burgle and were both sentenced to three years' imprisonment. Both appealed against conviction with leave of the single judge and Turnbull applied for leave to appeal against sentence. The facts are set out in the judgment of the court.

Cur adv vult

9 July 1976. The following judgment was delivered.

LORD WIDGERY CJ

read the following judgment of the court. On 13 October 1975 at Newcastle-upon-Tyne Crown Court the appellants Turnbull and Camelo were convicted of conspiracy to burgle. They were each sentenced to three years' imprisonment. They both appeal against conviction by leave of the single judge. On 13 November 1974 at the Central Criminal Court the appellant Whitby was convicted of robbery and sentenced to six years' imprisonment. He appeals against his conviction by leave of this court. On 11 February 1976 at Plymouth Crown Court the appellant Roberts was convicted of unlawful wounding and sentenced to three months' detention which he has served. He appeals against his conviction by leave of the single judge.

Each of these appeals raises problems relating to evidence of visual identification in criminal cases. Such evidence can bring about miscarriages of justice and has done so in a few cases in recent years. The number of such cases, although small compared with the number in which evidence of visual identification is known to be satisfactory, necessitates steps being taken by the courts, including this court, to reduce that number as far as is possible. In our judgment the danger of miscarriages of justice occurring can be much reduced if trial judges sum up to juries in the way indicated in this judgment.

First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a

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warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what

distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment, when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution. Were the courts to adjudge otherwise, affronts to justice would frequently occur. A few examples, taken over the whole spectrum of criminal activity, will illustrate what the effects on the maintenance of law and order would be if any law were enacted that no person could be convicted on evidence of visual identification alone.

Here are the examples. A had been kidnapped and held to ransom over many days. His captor stayed with him all the time. At last he was released but he did not know the identity of his kidnapper nor where he had been kept. Months later the police arrested X for robbery and as a result of what they had been told by an informer they suspected him of the kidnapping. They had no other evidence. They arranged for A to attend an

identity parade. He picked out X without hesitation. At X's trial, is the trial judge to rule at the end of the prosecution's case that X must be acquitted?

This is another example. Over a period of a week two police officers, B and C, kept observations in turn on a house which was suspected of being a distribution centre for drugs. A suspected supplier, Y, visited it from time to time. On the last day of the observation B saw Y enter the house. He at once signalled to other waiting police officers, who had a search warrant to enter. They did so; but by the time they got in, Y had escaped by a back window. Six months later C saw Y in the street and arrested him. Y at once alleged that C had mistaken him for someone else. At an identity parade he was picked out by B. Would it really be right and in the interests of justice for a judge to direct Y's acquittal at the end of the prosecution's case?

A rule such as the one under consideration would gravely impede the police in their work and would make the conviction of street offenders such as pickpockets, car thieves and the disorderly very difficult. But it would not only be the police who might be aggrieved by such a rule. Take the case of a factory worker, D, who during

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the course of his work went to the locker room to get something from his jacket which he had forgotten. As he went in he saw a workmate, Z, whom he had known for years and who worked near him in the same shop, standing by D's open locker with his hand inside. He hailed the thief by name. Z turned round and faced D; he dropped D's wallet on the floor and ran out of the locker room by another door. D reported what he had seen to his chargehand. When the chargehand went to find Z, he saw him walking towards his machine. Z alleged that D had been mistaken. A directed acquittal might well be greatly resented not only by D but by many others in the same shop.

When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification. For example, X sees the accused snatch a woman's handbag; he gets only a fleeting glance of

the thief's face as he runs off but he does see him entering a nearby house. Later he picks out the accused on an identity parade. If there was no more evidence than this, the poor quality of the identification would require the judge to withdraw the case from the jury; but this would not be so if there was evidence that the house into which the accused was alleged by X to have run was his father's. Another example of supporting evidence not amounting to corroboration in a technical sense is to be found in *R v Long*. The accused, who was charged with robbery, had been identified by three witnesses in different places on different occasions, but each had only a momentary opportunity for observation. Immediately after the robbery the accused had left his home and could not be found by the police. When later he was seen by them he claimed to know who had done the robbery and offered to help to find the robbers. At his trial he put forward an alibi which the jury rejected. It was an odd coincidence that the witnesses should have identified a man who had behaved in this way. In our judgment odd coincidences can, if unexplained, be supporting evidence.

The trial judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification. If there is any evidence or circumstance which the jury might think was supporting when it did not have this quality, the judge should say so. A jury, for example, might think that support for identification evidence could be found in the fact that the accused had not given evidence before them. An accused's absence from the witness box cannot provide evidence of anything and the judge should tell the jury so. But he would be entitled to tell them that when assessing the quality of the identification evidence they could take into consideration the fact that it was uncontradicted by any evidence coming from the accused himself.

Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the jury are satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward, that fabrication can provide any support for identification evidence. The jury should be

reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was.

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In setting out these guidelines for trial judges, which involve only changes of practice, not law, we have tried to follow the recommendations set out in the report which Lord Devlin's committee made to the Secretary of State for the Home Department in April 1976^a. We have not followed that report in using the phrase 'exceptional circumstances' to describe situations in which the risk of mistaken identification is reduced. In our judgment, the use of such a phrase is likely to result in the build-up of case law as to what circumstances can properly be described as exceptional and what cannot. Case law of this kind is likely to be a fetter on the administration of justice when so much depends on the quality of the evidence in each case. Quality is what matters in the end. In many cases the exceptional circumstances to which the report refers will provide evidence of good quality, but they may not; the converse is also true.

^a Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases (chairman: Lord Devlin) (1976) HC 338

A failure to follow these guidelines is likely to result in a conviction being quashed and will do so if in the judgment of this court on all the evidence the verdict is either unsatisfactory or unsafe. Having regard to public disquiet about the possibility of miscarriages of justice in this class of case, some explanation of the jurisdiction of this court may be opportune. That jurisdiction is statutory: we can do no more than the [Criminal Appeal Act 1968](#) authorises us to do. It does not authorise us to retry cases. It is for the jury in each case to decide which witnesses should be believed. On matters of credibility this court will only interfere in three circumstances: first, if the jury has been misdirected as to how to assess the evidence; secondly, if there has been no direction at all when there should have been one; and, thirdly, if on the whole of the evidence the jury must have taken a perverse view of a witness, but this is rare.

The limitations, such as they are, on our jurisdiction do not mean that we cannot interfere to prevent miscarriages of justice. In 1966 Parliament released appellate jurisdiction in criminal cases tried on indictment from the limitations which the Criminal Appeal Act 1907 and the case law based on it had put on the old Court of Criminal Appeal. The jurisdiction of this court is wider. We do not hesitate to use our

extended jurisdiction whenever the evidence in a case justifies our doing so. In assessing a case, however, it is our duty to use our experience of the administration of justice. In every division of this court that experience is likely to be extensive and helps us to detect the specious, the irrelevant and what is intended to deceive. We turn now to consider the facts of these appeals in the light of those observations. First, the Turnbull and Camelo appeal: these two appellants were convicted on a retrial. The case for the Crown in short was that the two appellants had devised a scheme whereby they could induce shopkeepers, customers of the Gosforth branch of Lloyds Bank Ltd, to post their night safe wallets containing their day's takings through the ordinary letter box in the main front door of the bank instead of into the night safe. The appellants then intended that in the course of the following night or weekend they would break into the bank through a window at the rear of the branch, which was unprotected by any burglar alarm, and remove the wallets which would conveniently be lying on the floor just within the bank's front door.

The first step in the conspiracy was to put the night safe out of action by inserting a bent nail into its lock. A notice typed on bank notepaper and purporting to be signed by a non-existent area manager was then fixed above the night safe. This notice informed customers that owing to vandalism the night safe was out of order and advised them to put their deposits through the bank letterbox. Over the latter a card was fixed on which was boldly printed the message: 'NIGHT SAFE HERE'. Between about 5.30 pm and 6.30 pm on 21 December 1974 a number of unsuspecting shopkeepers and the employees of one security firm, following the instructions on the two notices, posted wallets containing over £5,000 takings through the bank's letterbox. One shopkeeper, however, became suspicious and got in touch

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with the police. In the result, at 7.10 pm, the bank manager, Mr Salkeld, and his assistant, Mr Alderson, accompanied by two police constables, went to the bank. They waited outside until the police constables were relieved by Det Sgt Wakenshaw, and then the two bank officials and the detective sergeant went inside. They then set about making preparations to entrap whoever might be the intended burglars. Mr Alderson gave evidence that at about 8.00 pm he was by the front door substituting empty for the full night safe wallets, when he heard a rustling sound just outside and close to the letterbox. He opened the door and found that the notice that had been fixed just above the letterbox had been removed. He shouted to alert Mr Salkeld and Det Sgt Wakenshaw and, whilst just outside the front door, saw a man walking close to the outside wall of the bank in which the night safe was installed. He described this man as about 5 ft 8 ins tall, as having

dark hair and as wearing a three-quarter length coat similar to the coat which Turnbull was subsequently shown to have been wearing that night, and which was produced as an exhibit at the trial. Mr Alderson, however, did not see the man's face. Nevertheless, the description of the man which he did give fitted Turnbull so far as it went.

In his turn, Mr Salkeld gave evidence that when he heard Mr Alderson's shout he went out of the bank's front door and walked clockwise round the bank by way of the main road on to which it faced, a small back lane, and a side road which entered the main road close to the front door of the bank. As he did this he saw a van in that side road and took its number. There was no dispute at the trial that that van had been hired by Camelo shortly before these events and that he was driving it that night. On reaching the main road, the van turned left away from the bank and in the direction of Newcastle. Mr Salkeld himself had been unable to recognise anyone who may have been in the van. However, by this time Det Sgt Wakenshaw was outside the bank's front door and he gave unchallenged evidence to the effect that two or three minutes after 8.00 pm he had there seen a van with Camelo at the wheel drive past fairly slowly down the side road and turn left into the main road.

The principal witness on identity, however, for the Crown was a Det Con Smith. He gave evidence that on the relevant night he had signed off duty at Gosforth police station, which was not far from the bank, at 8.00 pm. He went to the car park at the rear of the police station and drove into the main road to which reference has been made and along it towards the bank. As he did so, and at a point which it was agreed was some 62 yards from the front door of the bank, Det Con Smith said that he saw a man in that doorway who seemed to be taking a notice from the door of the bank. The man left the doorway and started to walk to his left along the pavement with his shoulders hunched to the point in the wall of the bank where the night safe was. There he pulled another notice quickly off it and as he did so he glanced briefly to his right, that is to say along the main road in the direction from which Det Con Smith had been coming.

At the time Det Con Smith's car was just passing the bank, some ten yards or so from the night safe and Det Con Smith's evidence was that as the man turned his head he (Smith) recognised him and recognised him as Turnbull. The latter was a man whom the officer had known for some time. Det Con Smith said that it was a well-lit street and that he had no difficulty in recognising Turnbull. Very shortly after this, Smith saw two men run from the side road into the main road and recognised one of them as Det Sgt Wakenshaw. The other in all probability was Mr Salkeld. Det Con Smith then drove in a wide sweep round the bank in an attempt to intercept Turnbull, but did not see him. He did, however, meet

another police officer and, having spoken to him, drove home. He said that about half an hour later he spoke on the telephone to Det Sgt Wakenshaw, and that on the following morning, as soon as he reported for duty at the police station, he entered in his notebook that which he had seen on the previous night. Naturally, Det Con Smith was cross-examined strongly by counsel for each appellant; various criticisms and matters arising out of his evidence were put

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to him, but it is not necessary for the purposes of this judgment to go into them in detail.

The action then moved to another part of Gosforth, about a mile away from the bank. A woman police constable, Pc Thompson, gave evidence, which was not disputed, that at 8.05 pm she was on duty in a police vehicle with Pc Sewell. They saw a blue van with two people in it travelling at a fast speed. Having received a wireless message, they followed it and ultimately were able to stop it. As they did so she saw Turnbull stepping on to the pavement from the side of some bushes nearby. Camelo was in the driver's seat of the van. She went across and searched the bushes and there she found a number of housebreaking implements. In the result both Turnbull and Camelo were then arrested, taken to the police station and cautioned. In the course of subsequent questioning Camelo purported not to know Turnbull, but it was suggested that if Camelo had said this to the police officer it was said in a purely flippant manner, for it was admitted by the defence at the trial that Turnbull and Camelo did in fact know each other at all material times.

On the facts as outlined, the case against both Turnbull and Camelo of course rested principally on Det Con Smith's evidence of his identification of Turnbull. Before the jury could convict either Turnbull or Camelo they had to be satisfied of both the honesty and the correctness of this identification. Each of these aspects was challenged not only in the court below, but also in this court. The first can be disposed of shortly. The jury saw and heard Det Con Smith giving evidence, and being cross-examined, and the criticisms made of his evidence were fully put to them in the course of the summing-up, of which no criticism has been or indeed could be made. By their verdict the jury clearly indicated that they thought this police officer to be an honest witness and there is no ground whatever on which this court could come to any contrary conclusion.

On the question of the correctness of the identification, the learned judge did warn the jury of the special need for caution and also explained to them the reason for this. On the other hand, as the appellant's counsel contended before this court, Det Con Smith only had a brief fleeting view of the side of Turnbull's face at night, albeit in a well-lit street, from a moving motor car. His identification in such circumstances, it was submitted, could not be relied on and consequently he contended

that the jury's verdict should be set aside as unsafe and unsatisfactory.

Counsel for the Crown accepted that what we have called the quality of the identification by Det Con Smith could not be said to have been good, and indicated that had there been no other supporting evidence he would not have been disposed to argue that the appellants' conviction should stand. In the circumstances of the present case, however, and seeking to apply the general principles to which we have referred, he contended that there was ample other evidence which went to support the correctness of Det Con Smith's identification. He pointed out that Det Con Smith already knew Turnbull and that his was more recognition than mere identification. Both Det Con Smith and Mr Alderson gave a general description of the man they each saw and of the coat which he was wearing that night which was consistent with the facts. A van recently hired by Camelo was in the vicinity at the relevant time and Det Sgt Wakenshaw had recognised Camelo at the wheel as the van passed the bank. A few minutes later, when the van was stopped a mile or so away, both Camelo and Turnbull were in it and there was substantial evidence that at about that time the latter at least had been in possession of housebreaking implements.

We agree. All this was in our judgment clearly evidence which went to support the correctness of Det Con Smith's identification of Turnbull, and thus the implication that both he and Camelo had conspired as charged. Given the honesty of Det Con Smith's identification which, as we have said, the jury must have accepted, our opinion is that there can be no real doubt about its accuracy. In the result, we do not think that it can be said that the verdicts in this case were in any way unsafe or unsatisfactory and these appeals against conviction are therefore dismissed. Insofar as

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Turnbull's renewed application for leave to appeal against sentence is concerned, we have already indicated that this too is dismissed. This was a sophisticated plan to burgle bank premises, and had it succeeded the appellants would have stolen over £5,000. The sentences passed can be criticised neither in principle nor extent and it was for these reasons that Turnbull's further application was dismissed.

Then we pass to Roberts's appeal. The offence was alleged to have taken place on the evening of 26 July 1975 at a dance hall in Plymouth in a passageway behind the stage. According to the victim, a man named Taylor, somebody bumped into him and then butted him on the nose. This led to an exchange of blows and then Taylor's assailant hit him on the top of the head with a pint beer glass. There is some conflict whether the glass was broken on Taylor's head or whether it was deliberately smashed against a wall before being used on his head, but in the result he had to have 20 stitches

in his head and shoulder. His assailant ran away. Nothing further material occurred until 13 December 1975, approximately five months later, when the appellant was at the dance hall where the wounding had taken place. Taylor was there too and claimed to recognise the appellant as the man who had attacked him the previous July. The appellant at once denied that he knew anything about it. On 18 December the appellant was put on an identification parade. A Miss Kennedy who had witnessed the attack picked him out as the assailant. Her boy friend, one Inman, who had been with her at the material time, picked out somebody quite different who certainly had nothing to do with the matter.

At the trial Taylor and Miss Kennedy again identified the appellant. At the end of the prosecution case a submission was made inviting the judge to withdraw the case from the jury, but he rejected this and in due course the jury convicted. No criticism is made of the summing-up save that it was said there was an error in not pointing out that Inman admitted in cross-examination that he had had as good a view as Miss Kennedy. This court is, however, asked to hold that the verdict was unsafe and unsatisfactory.

The case for the appellant can be summarised in this way. First, that the identifying witnesses did not claim to have known the assailant before the attack. Secondly, that the attack was all over in a few moments. Thirdly, that the place where the attack took place was dark, lit only by flashing lights of the kind popular in dance halls. Fourthly, that the appellant's conduct after he had been accused was consistent with the honesty of his denial and that in particular he did not deny that he might have been at the dance hall on the evening in question or seek to set up an alibi. He simply said that it was so long ago that he could not remember where he was. Fifthly, it was pointed out that Inman, who had had as good a view as Miss Kennedy, could not identify the appellant. Finally, there were discrepancies and contradictions in the descriptions of the assailant given by the identifying witnesses. As to this last matter, Taylor's original description of his attacker was that he had thick black curlyish hair which was collar length, long thick sideburns which appeared to be joined like a beard and that he was wearing a white lightweight jumper with a design on it. In evidence-in-chief he described the hair as shoulder length and the clothing as a white floppy jumper. He claimed to have seen the man for a couple of seconds. In cross-examination he described the garment as a white heavyweight cardigan. He did not think his attacker had a beard, though he was not sure, but he was positive the man had a moustache.

Miss Kennedy described the man as having lightish bushy shoulder length hair and as wearing a white T-shirt. In cross-examination she was positive he had a beard and moustache. There were also discrepancies

about the assailant's height. There was, moreover, evidence that the appellant had never had a beard and had not grown a moustache until after the date of the attack. No suggestion was made that the identifying witnesses were dishonest. It is conceded that Miss Kennedy in particular was an impressive witness. But the quality of the identifications was not good, indeed

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there were notable weaknesses in it and there was no evidence capable of supporting the identifications made. We think it would have been wiser for the trial judge to have withdrawn the case from the jury. In the circumstances, the verdict was unsafe and unsatisfactory and for that reason we have allowed the appeal, applying the general principles enumerated earlier in this judgment.

Then, finally, there is the Whitby appeal. The case against this appellant was based principally on evidence of identification. A man called Lenik was indicted with Whitby; he was acquitted. On 15 March 1975 leave to appeal against conviction and sentence was originally refused by the single judge. On 24 March 1975 these applications were renewed. For the purposes of this appeal it is sufficient to say that over the ensuing months information was received and investigated by the Metropolitan Police with the result that they were satisfied that there had been an incorrect identification in this case and that the appellant had not in fact committed the offence of which he had been convicted. On 11 November 1975 the Director of Public Prosecutions informed the registrar of this court by letter that he had taken over the conduct of this case on behalf of the Crown. The appellant's renewed applications ultimately came before this court on 13 May 1976. On that occasion counsel for the Crown indicated that those concerned with the prosecution had by then grave doubts about the justice of the conviction and that in consequence his instructions were to assist the court in any way that he could rather than actively to respond to the appellant's appeal. In those circumstances, this court granted leave to appeal and adjourned the hearing to a date to be fixed. It was in fact this particular case which led to the convening of this full court to consider the various problems which have arisen relating to identification evidence in criminal cases, and which has resulted in the judgment which this court is now delivering.

The brief facts of the case are that on 14 February 1974 a number of men attempted to steal some £23,000 from the wages office of EMI Ltd in Uxbridge Road, Hayes. This was money to pay employees' wages and had been delivered to the premises shortly before. Two men entered the office next to that in which the money had been placed. One, and possibly both of them, were wearing balaclava helmets. One man was carrying a wooden cosh, the other a pistol. With these they threatened two clerks in the wages office, Mr Byrne and

Mr Marshall, and taking the wages bags in holdalls which they were also carrying they made off down a corridor. There they were confronted by another EMI employee. He managed to snatch the holdall from one man before he hit him with a hammer and the other robber struck at him with the wooden cosh. The two men then ran on towards the works entrance, and before they escaped in a stolen motor car driven by a third man they were seen in different circumstances by a number of other witnesses. In all, including Mr Byrne and Mr Marshall, the robbers were seen by a total of 14 witnesses.

When Mr Marshall was first seen by the police very shortly after the robbery he told them that he could not describe the man who it was alleged was Whitby nor assess his age. Nevertheless, he subsequently decided that he did know the man with the balaclava who had threatened him. He decided that it had been Whitby, whom he knew as a fellow employee with EMI, and he consequently gave the police Whitby's name and address. Both Whitby and Lenik were employed by EMI at that time. They worked together on the night shift and had finished work that morning at about 7.00 am. Whitby's evidence was that he took Lenik home in his car and then went on to his own home where he went to bed.

Later that day, however, having been given his name and address by Marshall, the police arrested Whitby and took him to the local police station. He at once denied that he was in any way concerned in the robbery and maintained this denial throughout. He contended that at the time the robbery was being committed he was in bed at home. In this he was supported by his wife who gave evidence to this effect at the trial. Whitby's house was searched, but the only articles of relevance found were a

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number of toy guns which he said were his children's. One of them was a somewhat realistic imitation of a real pistol.

In the course of interrogation at the police station, Whitby gave two answers which at one stage of the trial it was suggested could be considered as admissions, notwithstanding that overall he was denying any complicity on his part. We were told, however, that counsel for the Crown did not rely on them in his final address to the jury at the Central Criminal Court. Forensic examination of the appellant's clothing revealed a small fragment of glass which was similar to that of the windscreen of the getaway car used by the robbers and which was shattered by one of the witnesses trying to prevent their escape. Finally, the day after his arrest, the appellant was put on an identity parade. Of the 14 witnesses to the robbery, 12 attended and three purported to identify the appellant. This essentially was the evidence led against the appellant at the trial and, as will be clear, it was founded on the

identification said to have been made by the three witnesses of him on the identification parade.

In the course of his summing-up the learned judge did warn the jury that mistakes in identification are possible, but in our opinion the warning that he gave was inadequate. Further, any effect that it might have had on the jury was, we think, nullified by his final comment on the point:

'Nevertheless [the judge said] make no bones about it, there is a massive block of prosecution evidence implicating these two accused in this robbery, three people have identified each of them.'

Further, the learned judge gave the jury no help about the quality of the identification of the appellant, which in our view was meagre in the extreme. So far as Marshall was concerned, as we have already said, he had decided that this appellant had been one of the robbers before he attended any identification parade, and some time after he had told the police he was unable to describe him. That in these circumstances Marshall picked out this appellant on the parade, when his mind was already made up, clearly added nothing to the case against this appellant. The learned judge put this point before the jury merely as an argument raised by the defence. In our view this was not sufficient: the jury should have been given a clear direction about Marshall's purported identification of the appellant on the parade.

Insofar as the identification of the appellant by the other two witnesses on the parade was concerned, one of them had at the robbery only seen the man whom he said had been the appellant from the rear. The other had given to the police before the parade a description of a man which in no way fitted the description of the appellant in fact. In addition one must remember that all these identifications were of a man wearing a balaclava helmet who was only seen for a short time in the hurly-burly of a robbery and subsequent chase. Clearly the quality of the identifications in this case was very poor. Was there any supporting evidence? In the course of his summing-up the learned judge in effect put before the jury the three matters to which we have already referred. First, what were said to amount to admissions in the course of the questioning of this appellant by the police. Counsel for the Crown in this court told us that he did not rely on these any more than did counsel for the Crown at the trial when all the evidence had been called and he was addressing the jury at the end. We agree and in our view nothing that was said by this appellant to the police could in any way be said to be evidence supporting the identifications.

Secondly, the toy gun. There was no real evidence that the man thought to have been this appellant even had a gun at any time during the robbery and in any event we do not think that the discovery of an imitation pistol among his children's toys when his house was searched was in any way supportive of the poor quality of the

identifications which were made.

Thirdly, the fragment of glass found on the appellant's coat. As we have said, there

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was evidence that this was similar to the glass of the windscreen of the get-away car. The forensic witness giving this evidence, however, also accepted that this was a very common type of windscreen glass. Further, there was substantial evidence called on behalf of this appellant that the windscreen of his own similar car had shattered two or three months earlier and that the small piece of glass might well have come from this. In the result the evidence on this point was entirely neutral. This was accepted by counsel for the Crown in the course of the argument on this appeal. In these circumstances we do not think that evidence of the finding of a fragment of glass on the appellant's coat in any way went to support the correctness of the identifications by the three witnesses.

Finally, we feel that we should refer briefly to the way in which the learned judge dealt with the appellant's wife's evidence at the trial. She was called to support his alibi, as such it effectively was, that at the time of the robbery he was in bed asleep at home. Of her evidence the trial judge said:

'Let me say, straightaway, one hates to pry into these things as between husband and wife, it is extremely distasteful, and what can the poor wife do other than back her husband up as much as she possibly can. This is not a criticism of her evidence at all, and you must approach her evidence on the same basis as that of all the other witnesses.'

In the first place, the two sentences just quoted were mutually inconsistent. What else was the first other than a criticism of the appellant's wife's evidence? Secondly, we think that the comment as it was left was unfortunate in that the learned judge did not go on to point out to the jury that as the appellant's alibi was that he was at home with his wife, who else could he have called to support it? This is a situation which not infrequently arises. In such circumstances it will almost certainly be present in the jury's mind that the witness is the defendant's wife and they will no doubt make what they think is the proper allowance for this fact. They should, however, be warned in most, if not all, similar cases that they should not necessarily regard the fact that the witness is the defendant's wife as derogating from the worth of her evidence when the nature and content of the defence is such that anyone would expect her to be called as a witness in any event.

In the result, we think that the quality of the identification evidence in this case was very poor and that there was no evidence of the nature to which we have referred put before the jury which could be said to support the correctness of the identifications. It follows, in our judgment, that the statement by the learned judge that there was a 'massive block of evidence' implicating the

appellant was factually incorrect and in consequence a serious misdirection. In these circumstances we have no doubt that this conviction was both unsafe and unsatisfactory, and it was on these grounds that we allowed this appeal.

Appeals of Turnbull and Camelo dismissed.

Appeals of Roberts and Whitby allowed; convictions quashed.

Solicitors: *Registrar of Criminal Appeals* (for Turnbull, Camelo and Roberts); *Reginald Johnson & Co*, Hayes (for Whitby); *Director of Public Prosecutions*.

N P Metcalfe Esq Barrister.

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A

Public Prosecutor v Ramli bin Shafie **TAB N**

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 45-42 OF 2000
AUGUSTINE PAUL J
26 JUNE 2002

B *Evidence — Credibility — Impeachment of witness' credit — Court required to consider evidence with due caution and care before application for leave to impeach is allowed — Whether the credit of a witness could be impeached when the inconsistency arose from different versions in the evidence itself — Whether material inconsistency extraneous in the evidence existed — Whether evidence of witness was of sufficient weight to create a doubt in the prosecution's case*

C The accused was charged with trafficking in dangerous drugs. The accused claimed trial to the charge. The prosecution rested its case on the evidence of Nor Azlina bte Abdullah (PW1), a sergeant attached to the police exhibit stores; Chief Inspector Yip Ngan Chew (PW2), the investigating officer of this case; Zalana bte Baharom (PW3), the wife of the accused; and Inspector Som Chai a/l Din Lian (PW4), the arresting officer. On 30 March 2000 at about 12 noon, PW4 led a team of police officers to the Shell Petrol Station, Jalan Pahang, Kuala Lumpur upon information received from a member of the public that a male Malay driving a Toyota motor car was carrying dangerous drugs in the car. At about 12.45pm, a blue Toyota KE motor car bearing registration number BAC 9586 drove into the petrol station. There was a male Malay in the car. When he got down from the car he was arrested. He was the accused. PW4 searched the car and the body of the accused but did not recover anything. The accused was then taken to the police station. PW4 instructed his officers to take the accused to his office at the sixth floor of the police station. After giving this instruction, PW4 went to meet his senior officer, one DSP Tan Soon Fuan. PW4 came back to his office at about 1.25pm. He read the caution under s 37(A)(1)(b) of the Dangerous Drugs Act 1952 to the accused and asked him two questions. PW4 made a record of the questions and answers. The accused then led PW4 and a team of police officers to his house. The accused took the police officers to the hall of the house. PW3 and her two children were in the house at that time. The exhibits recovered were a plastic packets; an English newspaper; and dried leaves. PW2 sent the exhibits to the chemist for analysis who confirmed that it contained a total of 905.5g of cannabis. During the course of the proceedings, the learned DPP applied for leave to impeach the credibility of PW3.

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Held:

I (1) The application for leave required a consideration of whether the credit of a witness could be impeached when the inconsistency arose from different versions in the evidence itself that has been given in court. The issue was whether the expression 'former statements' in s 155(c) of the Evidence Act 1950 ('the Act') included a statement given in evidence at an earlier stage of the

same proceeding. The fact is that only with a former statement may the credit of a witness be impeached. For a former statement to be inconsistent with any part of the evidence it must be extraneous to the evidence given in court. The former statement must therefore have been made on a previous occasion. In the instant case, the application made by the learned DPP could not be sustained as there was no evidence of a former inconsistent statement made by PW3 within the meaning of s 155(c) of the Act (see p 163B–D, G–H).

- (2) Ordinarily when a party puts a witness in the box he may be taken to represent to the court that the witness is expected to state the truth. Be that as it may, there is no rule of law saying that a party is precluded from saying that a witness produced by him is not speaking the truth upon some particular point unless he has been declared hostile (see p 164F–G); *Baburan v Emperor* AIR 1939 All 754 followed. It is not right to proceed on the basis that whatever is stated by a witness which is not in favour of the party calling him should necessarily be believed as if it were an admission made and binding upon the party calling him (see p 164G–H); *State of Mysore v Raju Shetty & Ors* AIR 1961 Mys 74 followed.
- (3) In assessing the credibility of PW3, it had to be determined whether her evidence was consistent with itself and, more importantly, whether it fit in with the other evidence adduced by the prosecution. The re-examination of PW3 did not cover the full area of inconsistencies in her evidence. It could not be assumed that what PW3 said in cross-examination was not the truth. It still had to be assessed for whatever value it could have (see pp 165F, 166A–B); *Jai Pal Singh v State* [1996] Cri LJ 4097 followed. Where there are material inconsistencies in the evidence of a witness he may be believed if he is supported by other satisfactory evidence (see p 166B); *Kalachand Sircar v Queen-Empress* ILR 13 Cal 53 followed. In such circumstance, the court may, after considering the evidence of the witness as a whole, with due caution and care, accept, in the light of his testimony which it finds to be credit worthy and act upon it (*Sat Pal v Delhi Administration* AIR 1976 SC 294). As PW3 had not been given an opportunity to fully explain herself, a finding on her credibility would best be done against the background of the other evidence in the case (see p 166B–D).
- (4) The evidence of PW3 was corroborated by the pointed nature of the question that PW4 posed to the accused. To that extent the evidence of PW3 was of sufficient weight to create a doubt in the prosecution case insofar as the evidence of the accused under s 27 of the Act was concerned. The fact that PW3 was the wife of the accused did not disentitle her to credence, until cogent reasons for disbelief had been advanced (see p 167D–E); *Balasingham v PP* [1959] MLJ 193 and *Rattan Singh v PP* [1971] 1 MLJ 162 followed. No such evidence was adduced by the prosecution. In

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- A the circumstances, the prosecution had failed to make out a prima facie case against the accused and he should accordingly be acquitted and discharged (see p 167E, G).

[Bahasa Malaysia summary]

- B Tertuduh telah dituduh mengedar dadah berbahaya. Tertuduh menuntut perbicaraan kepada pertuduhan tersebut. Pihak pendakwaan menyandarkan kesnya pada keterangan Nor Azlina bte Abdullah (PW1), seorang sarjan yang berkhidmat di stor ekshibit polis; Ketua Inspektor Yip Ngan Chew (PW2), pegawai menyiasat kes ini; Zalana bte Baharom (PW3), isteri tertuduh; dan Inspektor Som Chai a/l Din Lian (PW4), pegawai yang menangkap. Pada 30 Mac 2000 lebih kurang jam 12pm, PW4 membawa sekumpulan pegawai-pegawai polis ke Stesyen Petrol Shell, Jalan Pahang, Kuala Lumpur setelah menerima maklumat dari orang awam bahawa seorang lelaki Melayu yang memandu sebuah kereta Toyota sedang membawa dadah berbahaya di dalam kereta tersebut. Pada lebih kurang jam 12.45pm, sebuah kereta Toyota KE biru yang mempunyai nombor pendaftaran BAC 9586 memasuki stesyen petrol tersebut. Seorang lelaki Melayu berada dalam kereta tersebut. Ketika beliau turun daripada kereta tersebut beliau telah ditahan. Beliau adalah tertuduh tersebut. PW4 mengeledah kereta tersebut serta tubuh tertuduh tetapi tidak menjumpai apa-apa. Tertuduh kemudiannya dibawa ke balai polis.
- C E PW4 telah mengarahkan pegawai-pegawainya membawa tertuduh ke pejabatnya di tingkat enam balai polis. Selepas memberikan arahan ini, PW4 telah pergi berjumpa pegawai kanan beliau, DSP Tan Soon Fuan. PW4 kembali semula ke pejabatnya pada lebihkurang jam 1.25pm. Beliau telah membaca pernyataan beramaran di bawah s 37(A)(1)(b) Akta Dadah Berbahaya 1952 kepada tertuduh dan menanyakan kepada beliau dua soalan. PW4 mencatat soalan-soalan dan jawapan-jawapan tersebut. Tertuduh kemudiannya membawa PW4 dan satu kumpulan pegawai-pegawai polis ke rumahnya. Tertuduh telah membawa pegawai-pegawai polis itu ke bahagian ruang tamu rumah tersebut. PW3 dan dua orang anaknya berada di dalam rumah tersebut pada waktu itu. Ekshibit-ekshibit yang dijumpai adalah paket-paket plastik; satu surat khabar bahasa Inggeris; dan daun-daun kering. PW2 menghantar ekshibit-ekshibit tersebut kepada ahli kimia untuk dianalisa, ahli kimia tersebut telah mengesahkan bahawa ianya mengandungi sejumlah 905.5g kanabis/ganja. Ketika prosiding tersebut, TPR yang bijaksana memohon kebenaran untuk mencabar kebolehpercayaan PW3.
- F G H

Diputuskan:

- I (1) Permohonan untuk kebenaran memerlukan satu pertimbangan sama ada kebolehpercayaan seseorang saksi boleh dicabar apabila keadaan tidak konsisten berbangkit daripada versi berlainan dalam keterangan itu sendiri yang telah diberikan dalam mahkamah. Persoalannya adalah sama ada ungkapan 'former

statements' di dalam s 155(c) Akta Keterangan 1950 ('Akta tersebut') termasuk pernyataan yang diberikan di peringkat yang lebih awal prosiding yang sama. Hakikatnya adalah bahawa hanya dengan pernyataan yang terdahulu boleh kebolehpercayaan seseorang saksi dicabar. Untuk sesuatu pernyataan terdahulu menjadi tidak konsisten dengan mana-mana bahagian keterangan itu ianya mestikan melebihi keterangan yang telah diberikan di dalam mahkamah. Pernyataan terdahulu itu semestinya oleh itu dibuat pada waktu yang dahulu. Dalam kes semasa, permohonan yang dibuat oleh TPR yang bijaksana tidak dapat dipertahankan kerana tiada keterangan mengenai pernyataan terdahulu tidak konsisten yang dibuat oleh PW3 di dalam lingkungan maksud s 155(c) Akta tersebut (lihat ms 163B–D, G–H).

- (2) Biasanya apabila sesuatu pihak meletakkan seorang saksi dalam kandang saksi beliau boleh dianggap sebagai mengemukakan kepada mahkamah bahawa saksi itu dijangka akan menyatakan perkara yang benar. Begitupun keadaannya, tidak terdapat kaedah yang menyatakan bahawa sesuatu pihak dihalang daripada menyatakan bahawa seseorang saksi yang dikemukakan olehnya tidak berkata benar mengenai sesuatu perkara yang khusus kecuali ianya telah diisytiharkan belot (lihat ms 164F–G); *Baburan v Emperor* AIR 1939 All 754 diikuti. Ianya adalah tidak betul untuk berterus atas dasar bahawa apa sekalipun yang dinyatakan oleh seseorang saksi yang tidak memihak kepada pihak yang memanggilnya haruslah dipercayai seolah-olah ianya merupakan suatu pengakuan yang dibuat dan mengikat pihak yang memanggilnya (lihat ms 164G–H); *State of Mysore v Raju Shetty & Ors* AIR 1961 Mys 74 diikuti.

- (3) Dalam menilai kebolehpercayaan PW3, haruslah ditentukan sama ada keterangan beliau adalah konsisten dengan dirinya sendiri dan, lebih penting lagi, sama ada ianya sesuai dengan keterangan lain yang dikemukakan oleh pihak pendakwaan. Pemeriksaan semula PW3 tidak meliputi keseluruhan ruang yang tidak konsisten di dalam keterangan beliau. Ianya tidak dapat diandaikan bahawa apa yang telah diperkatakan oleh PW3 di dalam pemeriksaan balas tersebut bukannya benar. Ianya masih harus dinilai untuk apa sekalipun nilai yang ianya punyai (lihat ms 165F, 166A–B); *Jai Pal Singh v State* [1996] Cri LJ 4097 diikuti. Di mana terdapatnya keterangan seorang saksi yang tidak konsisten yang material beliau mungkin akan dipercayai jika beliau disokong oleh keterangan lain yang meyakinkan (lihat ms 166B); *Kalachand Sircar v Queen-Empress* ILR 13 Cal 53 diikuti. Dalam keadaan yang sedemikian, mahkamah boleh, selepas mempertimbangkan keterangan saksi secara keseluruhannya, dengan hemat dan pengamatan yang wajar, menerima, menurut keterangannya yang ianya dapati boleh dipercayai dan bertindak atasnya; *Sat Pal v Delhi Administration* AIR 1976 SC 29 diikuti. Oleh kerana PW3 telah tidak diberikan

- A** peluang yang secukupnya untuk memperjelaskan dirinya sendiri, keputusan mengenai kebolehpercayaannya sebaiknya dilakukan berdasarkan latar belakang keterangan lain di dalam kes tersebut (see p 166B–D).
- B** (4) Keterangan PW3 telah disokong oleh sifat soalan tepat yang dikemukakan oleh PW4 kepada tertuduh. Setakat itu keterangan PW3 mempunyai beban yang memadai untuk mewujudkan satu keraguan dalam kes pendakwaan sejauhmana keterangan tertuduh di bawah s 27 Akta tersebut adalah berkaitan. Hakikat bahawa PW3 merupakan isteri tertuduh tidak melepaskan beliau daripada hak untuk dipercayai, sehingga alasan-alasan yang sah bagi ketidakpercayaan telah dikemukakan (lihat ms 167D–E); *Balasingham v PP* [1959] MLJ 193 and *Rattan Singh v PP* [1971] 1 MLJ 162 diikuti. Tiada keterangan yang sedemikian telah dikemukakan oleh pihak pendakwaan. Dalam keadaan tersebut, pihak pendakwaan telah gagal untuk membuat satu kes prima facie terhadap tertuduh dan beliau sewajarnya hendaklah dibebaskan dan dilepaskan (see p 167E, G).]
- C**
- D**

Notes

For cases on impeachment of witness' credit, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 942–943.

E

Cases referred to

Ammathayarammal v Official Assignee AIR 1933 Mad 137 (refd)
Asokan v State of Kerala (1981) Ker LJ (SN) 34 Ker (DB) (refd)
Baburan v Emperor AIR 1939 All 754 (folld)
Balasingham v PP [1959] MLJ 193 (folld)

F

Bhojraj v Sitaram AIR 1936 PC 60 (refd)
BN Chobe v Sami Ahmad (1969) 1 Andh LT 32 (refd)
Herendra Kumar v Emperor AIR 1938 Cal 125 (refd)
ƒai Pal Singh v State [1966] Cri LJ 4097 (folld)
Kalachand Sircar v Queen-Empress ILR 13 Cal 53 (folld)

G

Khoon Chye Hin v PP [1961] MLJ 105 (refd)
Koli Nana Bhana v State of Gujarat 1986 Cri LJ 571 (refd)
Laxman Sahu v State of Orissa (1990) Cr LJ 821 (refd)
Muniandy & Ors v PP [1966] 1 MLJ 257 (refd)

H

PK Das v State (1971) ILR 2 Cal 392 (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705 (refd)
Rattan Singh v PP [1971] 1 MLJ 162 (folld)
Re v Lambert (1967) Crim LR 480 (refd)
Sahdeo Tanti v Bipti Pasin AIR 1969 Pat 415 (refd)
Sat Pal v Delhi Administration AIR 1976 SC 294 (folld)
Schmidt v Schmidt (1969) QWN 3 (refd)

I

State of Mysore v Raju Shetty & Ors AIR 1961 Mys 74 (folld)
Wee Swee Hon, Re, deceased; Lim Ah Moy & Anor v Ong Eng Say [1953] MLJ 123 (refd)
Yuen Chun Yi v PP [1997] 3 SLR 57 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(A)(1)(b), 39(B)(1)(a)(2)
Evidence Act 1950 ss 27, 154, 155(c)(d)

A

Sharlyza Alis bte Sharkawi (Deputy Public Prosecutor, AG's Chambers) for the prosecution.

Nik Hashim bin Nik Daud (*Nik Hashim & Assoc*) for the accused.

B

Augustine Paul J: In this case, the accused was charged with trafficking in dangerous drugs in the following terms:

Bahawa kamu pada 30 Mac 2000, jam lebih kurang 2.30 petang di rumah No 144-22Q, Tingkat 15, Blok D, Jalan Tun Razak, dalam Bandaraya Kuala Lumpur, Wilayah Persekutuan telah mengedar dadah berbahaya iaitu 905.5g cannabis, oleh yang demikian kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama.

C

The accused claimed trial to the charge. The prosecution rested its case on the evidence of Nor Azlina bte Abdullah (PW1), a sergeant attached to the police exhibit stores; Chief Inspector Yip Ngan Chew (PW2), the investigating officer of this case; Zalana bte Baharom (PW3), the wife of the accused; and Inspector Som Chai a/l Din Lian (PW4), the arresting officer. In his evidence, PW4 said that on 30 March 2000 at about 12 noon he led a team of police officers to the Shell Petrol Station, Jalan Pahang, Kuala Lumpur upon information received from a member of the public that a male Malay driving a Toyota motor car was carrying dangerous drugs in the car. At about 12.45pm a blue Toyota KE motor car bearing registration number BAC 9586 drove into the petrol station. There was a male Malay in the car. When he got down from the car he was arrested. He is the accused. PW4 searched the car and the body of the accused but did not recover anything. The accused was then taken to the police station. PW4 instructed his officers to take the accused to his office at the sixth floor of the police station. After giving this instruction he went to meet his senior officer, one DSP Tan Soon Fuan. PW4 came back to his office at about 1.25pm. He read the caution under s 37(A)(1)(b) of the Dangerous Drugs Act 1952 to the accused and asked him two questions. PW4 made a record of the questions and answers (exh P17). It reads as follows:

D**E****F****G**

Pada 30 Mac 2000 jam lebih kurang 1.30 petang saya bacakan amaran beramaran yang diperuntukkan di bawah s 37A(1)(b) 1952 (ADB) seperti berikut: 'Adalah menjadi kewajipan saya untuk memberi amaran kepada kamu bahawa kamu tidaklah diwajibkan menyatakan sesuatu atau menjawab apa-apa soalan, tetapi apa-apa jua yang kamu nyatakan, samada sebagai menjawab sesuatu soalan atau tidak, boleh diberi sebagai keterangan.

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S: Benarkah kamu faham amaran yang saya bacakan?

J: Ya, Saya faham.

S: Adakah kamu ada menyimpan apa-apa barang salah di rumah?

J: Ada, saya menyimpan ganja di rumah.

S: Bolehkah kamu tunjukan kepada saya?

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A J: Boleh.

Tt Pegawai Perakam Insp Som
Chai A/L Din Lian

Tt OKT
Ramli bin Shafie
KP 660712-08-5051

B The accused then led PW4 and a team of police officers to his house, the address of which is No 144-22-Q, Tingkat 15, Blok D, Jalan Tun Razak. The accused took the police officers to the hall of the house. PW3 and her two children were in the house at that time. As PW4 said:

C Di dalam ruang tamu tersebut OKT telah bawa saya ke salah satu penjurong di ruang tamu tersebut dan OKT telah mengeluarkan satu bungkusan plastik jenama Sogo dari bawah meja dan menyerahkan kepada saya. Selepas diserahkan kepada saya di hadapan OKT dan saksi polis didapati di dalamnya ada satu keratan akhbar bahasa Inggeris dan setelah dibuka didapati satu plastik lutsinar yang di dalamnya mengandungi satu ketulan mampat daun-daun kering disyaki dadah ganja. Saya kemudian bungkus semula dan barang kes serta OKT dibawa balik ke IPK Kuala Lumpur.

D In further describing the place from where the exhibits were recovered, he said:

E Kedudukan barang kes di dalam rumah ialah di bawah meja yang bertutup dengan kain dan terdapat dua kerusi sofa yang menutup separuh meja itu. (Saksi dirujuk kepada ID5D) Inilah kain yang saya maksudkan. Barang kes itu tidak boleh dilihat secara mudah apabila masuk ke dalam rumah. Barang kes itu berada di dalam keadaan tersembunyi.

F The exhibits recovered are a plastic packet (exh P12); an English newspaper (exh P13); another plastic packet (exh P14); and the dried leaves from exh P14 (exh P15). On 31 March 2000 PW4 handed them to PW2. On the same day, he went to the scene with PW2 and detective Lance Corporal Nordin bin Ismail, a police photographer. Four photographs were taken at the scene (exhs ID5 A–D). Later Nordin bin Ismail took a photograph of the exhibits at the police station (exh ID7). PW4 was cross-examined on his meeting with DSP Tan Soon Fuan. In answer to questions he said:

G Sebelum rakamkan ID17 saya jumpa pegawai atasan saya di tingkat yang sama. Pegawai itu juga dari Bahagian Risikan dan Interrogation. Saya berada dengan pegawai itu lebihkurang 10 minit. Saya jumpa dia atas urusan pejabat untuk memberi penjelasan atas tugas yang saya jalankan sebelum itu. Ini maksud kes lain. Saya tidak tulis ini dalam diari. Pegawai itu DSP Tan Soon Fuan. I deny that I got the address of the accused and information pertaining to the drugs from DSP Tan.

H In further cross-examination, PW4 said that he did not know where the accused stayed and that he had drugs there. PW4 also said that the Cheras Police Station has a narcotics division. He added:

I Di bahagian itu ada seorang sarjan bernama Hasnan. Sjn Hasnan tidak ada terlibat dalam kes ini. Saya tak setuju Sjn Hasnan ada terlibat. Saya tak setuju maklumat tentang kes ini diberi oleh Sjn Hasnan.

PW2 sent the exhibits to the chemist for analysis who confirmed that exh P15 contained a total of 905.5g of cannabis. On 21 February 2001, 133

PW2 served a copy of the chemist report (exh P9) on the accused. In his cross-examination, PW2 tendered in evidence the cautioned statement made by the accused (exh D26).

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PW3 said in her examination in chief, elicited on 3 July 2001, that on 30 March 2000 she stayed in the house with the accused and their three children. On that day she was on sick leave. The accused went out at 11am. When she was cooking in the kitchen, she saw the accused coming with some persons. When she signalled to her husband asking who they were he said:

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Ini tiada apa-apa hal.

She then left them to give some medicine to her child. She then added:

Ketika mereka keluar dari rumah saya berada di verandah. Akhirnya saya dapat tahu mereka yang datang ialah polis. Semasa mereka keluar saya nampak polis membawa sebungkus plastik and went away. Saya tidak tahu apakah bungkusan itu. Bungkusan itu tidak kepunyaan saya.

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When she was referred to exhs P12 and P7, she said:

(Saksi dirujuk kepada ID12) Bungkusan yang polis bawa adalah seperti ini. Saya tidak lihat apa yang ada dalam bungkusan itu. (Saksi dirujuk kepada ID7) Saya tidak pernah lihat benda ini. Beg plastik dan kandungannya tidak kepunyaan anak saya. Saya tidak nampak tempat dari mana beg plastik itu diambil.

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In her cross-examination on exhs P12 and P15, she said:

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(Saksi dirujuk kepada ID12) Saya biasa dengan beg seperti ini. Plastik beg macam ini ada banyak di rumah. Saya nampak beg ini semasa mereka keluar dan saya ada di verandah. Pada masa itu suami saya tidak digari. ID12 bukan saya punya. I do not know whether this bag belongs to my husband. Saya tidak tahu siapa punya. (Saksi dirujuk kepada ID15) Saya tengok barang ini baru-baru ini.

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Later she said:

ID12 dan kandungannya bukan kepunyaan saya. (Saksi dirujuk kepada ID5D) Kawasan bahagian bawah meja bulat adalah kawasan tersorok. Saya tidak nampak ID12 di bawah meja bulat ini. The first time I saw the bag adalah bila polis keluar beg ini.

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When asked about the friends of the accused she said:

Suami saya ada kawan bernama Zam dan seorang bernama Ass. Mereka biasa datang ke rumah. They came to the house last about two weeks before the tarikh kejadian. Normally when I come back home they will be leaving. So I do not know what they do. When they come they will possibly sit in the hall. They will come inside the house kerana ada kesan minum. Ini banyak kali. I do not know what they work as.

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She added:

Saya juga tidak beritahu tentang dua orang ini kepada polis.

On 6 June 2002, PW3 was recalled for further cross-examination by the defence. This is what she said:

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- A** Suami saya ditangkap pada 30 March 2000. Sebelum OKT ditangkap saya ada berhubung dengan polis di Balai Polis, Cheras. Saya berhubung dengan polis pada 29 Mac 2000 jam pukul 8.00 malam. Saya menelefon dari rumah. Saya cakap dengan seorang sarjan bernama Hasnan. Dia dari Bahagian Narkotik. Saya bagi tahu Sjn Hasnan bahawa saya syaki ada dadah di dalam beg plastik Sogo di dalam rumah saya. Pada hari itu apabila saya balik ke rumah pada jam 6.00 petang tiba-tiba ada dua orang kawan suami saya yang bernama Zam dan Ass tiba. Mereka menunggu suami saya pulang dan duduk di ruang tamu. Saya melihat mereka membawa beg plastik itu. Mereka menunggu suami saya pulang. Tidak lama kemudian mereka balik kerana sudah lewat. Keadaan kedua orang itu sangat mencurigakan. Setelah mereka balik saya pun mengemas rumah lalu terjumpa bungkusan tersebut. Saya menghubungi suami saya memaklumkan perkara itu. Perbualan dengan suami saya putus. Lepas itu seperti yang diarahkan oleh suami saya saya menelefon Sjn Hasnan. Bungkusan itu ada di bawah meja. Sjn Hasnan kata dia akan datang dengan segera. Saya ada maklumkan alamat saya. Lepas itu suami saya pun balik. Anak saya demam. Kami pergi ke klinik di Wangsa Maju. Saya ada jumpa Zam dan Ass beberapa kali sebelum perkara ini. (P17 dirujuk kepada saksi) Inilah bungkusan itu. Dalam plastik itu ada barang.
- D** Zam dan Ass telah ditangkap oleh polis. Saya dengar macam itu.

In her re-examination, she said:

Saya berhubung dengan seorang nama Sjn Hasnan. Saya kenal dengan Sjn Hasnan.

- E** The learned deputy public prosecutor ('the DPP') then applied for an adjournment of the proceedings to another date as her last witness Nordin bin Ismail, the photographer, was not available. I explained to her that it is not necessary to call him as a witness. All the photographs had been properly identified by PW2, PW3 and PW4 as an accurate representation of what they depicted without any objection to their authenticity. As such, they
- F** can be marked as exhibits. It has been held that although the usual method of proving the relevance of photographs will be by calling the photographer as a witness, this is not essential to their admissibility (see *Schmidt v Schmidt* (1969) QWN 3; *R v Lambert* (1967) Crim LR 480). In further elaboration, I refer to a passage from Evidence: *Proof and Practice* by Graham Roberts at p 545:

- G** A question that arises where photographs are to be tendered is whether it is necessary to call the photographer. Generally speaking, there is no need to call the photographer provided that a witness is available who can testify that what is shown on the photograph is a fair and accurate representation of the scene at the relevant time. Calling the photographer will generally only be necessary
- H** when no such witness is available or in special cases when technical details of the photographer's art are likely to be in question. In other words, what is required, in the usual case, of a witness through whom a photograph is to be tendered is first-hand knowledge of what is shown in the photograph rather than first-hand knowledge of the taking of the photograph (see *JW McElhaney, Trial Notebook* (2nd Ed, Litigation Section of the American Bar Association, 1987) pp 202–203).

- I** Similarly, *Documentary Evidence in Australia* by RA Brown (2nd Ed) says at p 41:

There are generally two methods for proving that things, including photographs, are those taken at the scene, either (1) by tracing custody of the film from the moment of taking until production in court, or (2) by identification of the ultimate print, through oral or other evidence, with the scene recorded (see *Russell v Russell* (1875) 4 QSCR 103 (in banco); *Schmidt v Schmidt* (1969) QWN 3 at 5; *Barron v Valdmanis*, unreported, NSW Sup Ct Meares J, 2 May 1978).

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As the photographs tendered for identification had been properly identified I admitted them as exhibits and caused them to be marked as exhs P5 A–D and P7 without the need for the photographer to formally tender them with the negatives. The prosecution then closed its case and was fixed for continued hearing on the following day.

On the following day the DPP applied for leave to recall PW3 for further re-examination in view of the contradictions in her evidence given on 3 July 2001 and 6 June 2002. I allowed the application. This is what PW3 said:

Pada 3 Julai 2001 saya ada beri keterangan di mahkamah. Semalam pun saya ada beri keterangan.

Q: Pada 3 Julai 2001 kamu ada kata mengenali Zam dan Ass bahawa 'They came to the house last about 2 weeks before the tarikh kejadian.' Semalam kamu kata 'Pada 29 Mac 2000 jam 6.00 petang apabila saya balik rumah tiba-tiba ada dua orang kawan suami saya yang bernama Zam dan Ass tiba. Mereka menunggu suami saya pulang.' Boleh terangkan perbezaan.

A : Kerana pada masa itu saya ta' ingat tapi memang mereka ada datang ke rumah.

Q : Puan telah dirujuk kepada P12 dan telah mengatakan bungkusan yang polis bawa adalah seperti ini. Saya tidak lihat apa yang ada dalam bungkusan itu. Apabila dirujuk kepada P7 kamu kata : 'Saya tidak pernah lihat benda ini.' Semalam kamu kata : 'Setelah mereka balik saya pun mengemas rumah lalu terjumpa bungkusan plastik tersebut.' Boleh terangkan.

A : Saya mengatakan saya tidak pernah nampak barang kes seperti dalam mahkamah seperti dalam gambar yang ditunjukkan tetapi saya memang ada lihat beg plastik itu. Pada hari itu apa yang ada dalam beg plastik saya ta' nampak. Tetapi saya syaki itu adalah dadah.

Q : Semalam kamu kata ada bagi tahu Sjn Hasnan bahawa ada dadah dalam beg itu. Kalau tidak lihat apa ada dalam beg bagaimana boleh bagi tahu Sjn Hasnan ada dadah dalam beg plastik itu?

A : Pertama dari perwatakan Zam dan Ass dan seperti seorang penagih dadah dan kedua saya pernah lihat dalam TV bagaimana dadah dibungkus. Ketiga dari segi beratnya bila saya angkat. Keempat, apabila saya telefon suami saya menerangkan barang tersebut dia kata itu mungkin disyaki dadah.

Q : Apabila rujuk kepada P12 pada tarikh 3 Julai 2001 kamu kata: Saya tengok barang-barang ini baru-baru ini. Semalam kamu kata: Saya melihat mereka membawa beg plastik itu. Bolehkah terangkan?

A : Maksud saya yang saya nampak ialah isi kandungan iaitu barang kes.

The learned DPP then submitted that PW3 had contradicted herself in her evidence and applied for leave to impeach her credit under s 155(c) of the Evidence Act 1950 ('the Act') which reads as follows:

- A The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls him:
- (a)
 - (b)
 - (c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

- B The application for leave requires a consideration of whether the credit of a witness can be impeached when the inconsistency arises from different versions in the evidence itself that has been given in court. In other words, does the expression 'former statements' in s 155(c) of the Act include a statement given in evidence at an earlier stage of the same proceeding? The answer to this question is significant in view of the fact that it is only with a former statement that the credit of a witness can be impeached. The language employed in s 155(c) of the Act makes the meaning of a former statement clear. The words used are that the credit of a witness may be impeached by proof of a former statement inconsistent with any part of his evidence. For a former statement to be inconsistent with any part of the evidence it must be extraneous to the evidence now given in court. The former statement must therefore have been made on a previous occasion. This is explained in the two illustrations to s 155 of the Act which refer to statements made on previous occasions. Further support for my view can be found in the meaning of a similar expression used in s 157 of the Act.
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- E As Biswas J said in *Herendra Kumar v Emperor* AIR 1938 Cal 125 at p 128:

The words 'former statement' in s 157 mean a previous statement of the witness who is to be corroborated made on another occasion, i.e. an occasion other than that at which the subsequent statement requiring corroboration is made.

- F Thus as Kang Hwee Gee J said in *PP v Chong Nyuk Min & Anor* [1995] 3 MLJ 642 at p 651:

It was clear that these four points could not constitute any valid ground on which counsel could mount his impeachment proceedings on DPC Mak. They were statements made in the course of the trial. Any variations or inconsistency that may arise in his evidence whether against his own evidence or against the evidence of another witness would have to be assessed accordingly by the court. They were all clearly outside the scope of s 155(d) of the Evidence Act 1950 which is concerned only with inconsistencies of 'former statements'. Accordingly, I disallowed counsel's application.

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- H It follows that the application made by the learned DPP cannot be sustained as there is no evidence of a former inconsistent statement made by PW3 within the meaning of s 155(c) of the Act. Perhaps the prosecution ought to have taken the necessary steps to have PW3 declared as a hostile witness pursuant to s 154 of the Act. There is nothing in the section to warrant an inference that only when any previous statement of the witness is available and if he is alleged to have departed from that the court can declare that witness hostile (see *Sahdeo Tanti v Bipti Pasin* AIR 1969 Pat 415). Thus, the section is not confined to contradictions in a former statement made by a witness; it also includes evidence given earlier (see *Re Wee Swee Hon*,
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deceased; *Lim Ah Moy & Anor v Ong Eng Say* [1953] MLJ 123; Even when a witness deposes in favour of the case of the party calling him, the court on a consideration of his evidence is entitled to either believe or disbelieve him. The rule does not change if the evidence given by such a witness is adverse to the case of the party calling him. Even in such a case, the court has the power and duty of deciding whether or not to believe him. It is, therefore, not right, in our opinion, to proceed on the basis that whatever is stated by a witness which is not in favour of the case of the party calling him should necessarily be believed as if it were an admission made and binding upon the party calling him (*Yuen Chun Yi v PP* [1997] 3 SLR 57). The permission to treat a witness as hostile can be made at any of the three stages of examination (see *BN Chobe v Sami Ahmad* (1969) 1 Andh LT 32). An application for recalling a witness whose examination is over for the purpose of treating him as hostile and cross-examine him will not be allowed (see *Ammathayarammal v Official Assignee* AIR 1933 Mad 137; *PK Das v State* (1971) ILR 2 Cal 392). The inconsistencies in the evidence of PW3 are therefore matters that go only to her credibility as a witness.

The evidence that PW3 gave in court on 6 June 2002 will have a significant bearing on the outcome of the case. This is because the case for the prosecution is anchored on information supplied by the accused under s 27 of the Act. The evidence of PW3 shows that the police had prior knowledge of the information. That will affect the admissibility of the information supplied by the accused and, thereby, the entire prosecution case. The learned DPP submitted at the close of the case for the prosecution that the evidence of PW3 must not be accepted; that it must be viewed with caution as she is the wife of the accused; and that even if her evidence is accepted it does not constitute prior knowledge as it was the accused who led the police to his house. It must be observed that PW3 was a witness who was called to testify by the prosecution. The prosecution made an unsuccessful attempt to impeach her credit. No attempt was made by the prosecution to have her declared as a hostile witness under s 154 of the Act. These are the two courses open to the prosecution to deal with a witness who is not telling the truth or is suppressing some truth (see *Koli Nana Bhana v State of Gujarat* 1986 Cri LJ 571). Ordinarily when a party puts a witness in the box he can be taken to represent to the court that the witness is expected to state the truth. Be that as it may, there is no rule of law saying that a party is precluded from saying that a witness produced by him is not speaking the truth upon some particular point unless he has been declared hostile (see *Baburan v Emperor* AIR 1939 All 754). It is not right to proceed on the basis that whatever is stated by a witness which is not in favour of the party calling him should necessarily be believed as if it were an admission made and binding upon the party calling him. In this regard, I refer to *State of Mysore v Raju Shetty & Ors* AIR 1961 Mys 74 where Narayana Pai and Ahmed Ali Khan JJ said at p 78:

It is true that ordinarily when a party puts a witness in the box, he can be taken to represent to the court that the said witness is expected to state the truth. It is also true on the ground of policy that a party should not be permitted to treat a witness as hostile the moment he gives any answers adverse to his case.

A It is entirely for the court to decide whether in given circumstances a witness has turned hostile and whether permission should be granted to the party calling him to cross-examine him.

B Hence, even if a party calling a witness wants to treat him as hostile, his opinion as to the hostility or otherwise of the witness or the truth or otherwise of his evidence, is not final and not binding on the court. The very object of taking evidence is to discover the truth as far as it is humanly possible for the presiding judicial officer to do. The fact, therefore, that sound public policy requires that a party should not be permitted to malign his own witness, cannot and does not absolve the court of its own high duty of attempting to discover the truth.

C Even when a witness deposes in favour of the case of the party calling him, the court on a consideration of his evidence is entitled to either believe or disbelieve him. The rule does not change if the evidence given by such a witness is adverse to the case of the party calling him. Even in such a case, the court has the power and duty of deciding whether or not to believe him. It is, therefore, not right, in our opinion, to proceed on the basis that whatever is stated by a witness which is not in favour of the case of the party calling him should necessarily be believed as if it were an admission made and binding upon the party calling him.

E The Privy Council has stated that the real tests for either accepting or rejecting the evidence of a witness are how consistent the story is with itself, how it stands the test of cross-examination, and how far it fits in with the rest of the evidence and the circumstances of the case (see *Bhojraj v Sitaram* AIR 1936 PC 60). It has been held that if a witness demonstrably tells lies, his evidence must be looked upon with suspicion and treated with caution, but to say that that it should be entirely rejected would be to go too far (see *Khoon Chye Hin v PP* [1961] MLJ 105). The inherent probability or improbability of a fact in issue must be the prime consideration in assessing the credibility of a witness (see *Muniandy & Ors v PP* [1966] 1 MLJ 257). In assessing the credibility of PW3 it must therefore be determined whether her evidence is consistent with itself and, more importantly, whether it fits in with the other evidence adduced by the prosecution.

G I shall first consider whether the evidence of PW3 is consistent with itself. In her evidence on 3 July 2001, she said that she does not know whether exh P12 belongs to her husband; that she did not see it under the table; that the first time she saw it was when the police took it out; that she had not seen exh P15 earlier; that she had not seen the item in exh P7 previously; that the accused's friends, Zam and Ass, last came to her house about two weeks prior to the incident; and that she did not tell the police about these two persons. When she was recalled for further cross-examination on 6 June 2002 she said that Zam and Ass came to her house on 29 March 2000; that they brought a Sogo plastic bag into the house; that they looked suspicious; that she found the bag under the table when they left; that she informed the accused about it who told her to contact Sjn Hasnan; and that she duly informed Sjn Hasnan that she suspected that there were dangerous drugs in a Sogo plastic bag in her house and gave her address. When asked to explain her contradiction regarding the last time that Zam and Ass came to her house she said that she did not remember it

when she first testified but is sure that they came as she now claimed; with regard to her earlier testimony she confirmed that she had not previously seen the item in exh P7 but had seen the plastic bag before; that her earlier testimony on exh P12 was confined to its contents; and she explained why she suspected that the plastic bag contained dangerous drugs. It will be observed that the re-examination of PW3 did not cover the full area of inconsistencies in her evidence. It cannot be assumed that what PW3 said in cross-examination is not the truth. It must still be assessed for whatever value it may have (see *Jai Pal Singh v State* [1996] Cri LJ 4097). Where there are material inconsistencies in the evidence of a witness he can be believed if he is supported by other satisfactory evidence (see *Kalachand Sircar v Queen-Empress* ILR 13 Cal 53). In such circumstance, the court may, after considering the evidence of the witness as a whole, with due caution and care, accept, in the light of his testimony which it finds to be credit worthy and act upon it (see *Sat Pal v Delhi Administration* AIR 1976 SC 294). As PW3 has not been given an opportunity to fully explain herself a finding on her credibility is best done against the background of the other evidence in the case. The crux of the case for the prosecution is the information supplied by the accused as recorded in exh P17. PW4 said in his evidence that the information supplied by the accused is in response to two questions that he had asked. As I said in *PP v Hashim bin Hanafi* (Kuala Lumpur Cr Trial No 45-26-2001) at pp 19-20:

The information should not be given by any prompting with any pointed question (see Sarkar on Evidence 15th Ed Vol I p 527). The question put should not be phrased in such a way so as to juxtapose the words therein to give the impression that the accused gave information which not only led to the discovery of a fact but also contained an admission (see *PP v Norzilan bin Yaacob & Anor* [1989] 1 MLJ 442). The question should also not carry with it any in-built incriminating evidence in contravention of the requirements of s 27.

The first question asked by PW4 was whether the accused ‘... ada menyimpan apa-apa barang salah di rumah?’ This is a pointed question. It is specific in nature as it pin-points an identified place. It carries with it an implication that PW4 knew that the accused had incriminating objects in his house. This implication must be judged against certain other features of the prosecution case. It was suggested to PW4 in his cross-examination that he obtained the address of the accused and the information pertaining to the drugs from one DSP Tan Soon Fuan whom he had seen just prior to the interrogation of the accused. PW4 denied the suggestion. I am aware that a suggestion put to a prosecution witness is not evidence. But it is an indication of the case to be advanced by the defence. However, as I said in *PP v Chia Leong Foo* [2000] 6 MLJ 705 at pp 729-730:

... the prosecution is expected to negative in its case in chief the explanations that the defence could be expected to advance in answer to the allegations against it (see *Evidence: Proof and Practice* by Graham Roberts (1st Ed) p 376).

It is my view that the prosecution ought to have called DSP Tan Soon Fuan as a witness to negate the suggestion made. This is necessary at this stage of

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- A the prosecution case in view of the implication arising from the first question asked by PW4. If the doubt is not resolved the implication will remain as such and thereby affect the admissibility of the information. This is compounded by the fact that PW3, who, it must be noted, is a prosecution witness, said in her evidence that she had given prior information regarding the whereabouts of the drugs to Sjn Hasnan.
- B Sjn Hasnan does in fact exist and is not a fictitious figure. If he had been called as a witness by the prosecution his evidence, if contrary to that of PW3, would have completely demolished her evidence. With that the significance of the evidence of DSP Tan Soon Fuan will also disappear. However, Sjn Hasnan was not called as a witness by the prosecution. The implication attached to the first question asked by PW4, therefore, remains.
- C The prosecution has failed to avail itself of available resources to dispel this notion. The implication has the effect of showing that PW4 had prior knowledge of the information supplied by the accused which, consequently, is not admissible. This prior knowledge could have come from the information that PW3 gave to Sjn Hasnan. It must be observed that even in the case of a witness who has been declared hostile so much of his evidence which is corroborated by other evidence can be accepted (see *Laxman Sahu v State of Orissa* (1990) Cr LJ 821; *Asokan v State of Kerala* (1981) Ker LJ (SN) 34 Ker (DB)). The evidence of PW3 is corroborated by the pointed nature of the question that PW4 posed to the accused. To that extent the evidence of PW3 is of sufficient weight to create a doubt in the prosecution case insofar as the evidence of the accused under s 27 of the Act is concerned. The fact that PW3 is the wife of the accused does not disentitle her to credence, contrary to the submission of the learned DPP, until cogent reasons for disbelief have been advanced (see *Balasingham v PP* [1959] MLJ 193; *Rattan Singh v PP* [1971] 1 MLJ 162). No such evidence was adduced by the prosecution. The further submission that the information supplied by PW3 does not, in any event, amount to prior knowledge as it was the accused who led the police to the house is without merit. Pointing out premises of which the address is known to the police cannot amount to first information as the police could find the location without assistance. My assessment of PW3's credibility would have been different if not of the inherent weakness in the prosecution case to which I have made reference.
- G The case for the prosecution which had rested on this piece of evidence, therefore, collapses.

In the upshot, I held that the prosecution has failed to make out a prima facie case against the accused and, accordingly, acquitted and discharged him.

- H Order accordingly.

Reported by Peter Ling

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PZc PT PRT1 b hPrPa

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 ; C7B4c] Bs ut q t v t xu q y rus us 4S u xu s ut xur
 q t wq u xu u3 q wut yw q xu q ty w uq xuqt ut r Mkyuv T 4Y q y
 .c] ?/r ywy w xusq xu q uq y w4 dxu u q x v% ysu %w c] ? q t
 xu q uq q su v xu q ty w uq 4 %L %q usq uq t q ut 47; 386
 y u qu 2c] ? 2N5W5M K y q t N5M 4Y qvq xqt q u ut %L %q t
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Y q c y t x u q s s u t q q r B 4 6 4 4 7 B 4 4 6 6 ? q t q q r B 4 ; 4 4 x u
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L q q W u q b u Z 4 : 9 ; A 5 6 ? . N ? B / 4

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] N V ; C 7 B x q x u t r u q r u u u x u u 3 q q w u t y w v x u q u 4

U i P f 6 i f H

T Y u y 8 6 6 ? 2 c] C q ' y w y U 6 U 2 T V 2 V u t q x 4 K c] b y r y T q y q x u
M k y u v v T u y w u s u v U 6 U 2 T V 2 V u t q x q t u y c] C 4

[7 A 4 4 6 6 ? q q r C 4 6 q 4 2 c] C q y s u t r K c] b y r y T q y
q y c] B q q K] q s y w q x u r u % ' q % y q t w u q y y] u q w 4
K v u u s u y y w x u y s y 2 c] C w u x u y x c] B u v T V V u t q x q q r 7 4 6
4 4 v] u q w u u x u t w t y s q u 4 d x u q y u t q d u s U i w 2
] u q w q q r 9 0 6 4 4 K q r 9 4 ; 4 2 x y u r x v x u u u q q
u q q q y ' q t q q u t] u y q q d u s 2 x u u q u Y q q s q u q t x u
u u y t s u t r c] B c] C q %W % 2 %L % q t Y s x q u x y u c] C q
y t s u t x u q %q' K t q' 2 x y % ' q % x y x u t r s q q r y 4
%W % x u t y s u t y x c] C q x u q y v t w u y u t 4 c] C u u u t v
9 6 ' y w q q t %W % u y u t x q x u u u y w s y u s ' x u r t
x u v y w t q 4 L x u q ' u t v 9 6) q t q s u q u v x s x c] C
u v u t w t x q x u x q t u u x u u s x q t y u r q u t x q x u t
s u q t q ' u x u s ' 4 %W % q ' u t v q s q q t x u t w q t q t c] C x q
x u s ' s t r u s u s u t x u u t q 4 K q r : 0 6 4 4 x u q u t q 2 c] C
w u x u y x c] B u K c] Y u K y q t K c] b y q q u y c u r u q w
U q q y v x u v x u s u v x u t y s y 4



[7B4 466? q qr C66 q4 4c] C q y v ut r Kc] Yu K y xq
 N5cw4Y q cxt yr cq ux q t N5W5M Kzr Yqxq t t ruq y y wxy q t
 c] B4N5W5M Kzr t ru q u y wy usq yx c] C xyu N5cw Y q cxt y
 y ru y q xu sq yx c] B4Kvu q r yuy w2 q qr 7466 4 4c] C q t
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 b Y:; 266646 xyuc] Bq t N5cw Y q cxt y uu t y u xusq NKR ?9; yx
 xu q u ru qu v] NV; C7B4Nc] Uq q y sut xy sq q ru
 xq tut xut w ut v xusq qry ru qt ut 4Kvu xur yuy w2 xu
 uv v bu q q Zq y Vq t q] uyq y dus 2U wq y y wq qr ; 46
 4 4K qr ; 4; 4 4 xu q u x uu qu Y q q sq u4c] Cy v ut xu
 xq xuxqt xu u q t y w xu q ut uu2y q yx xy q .N5W5M
 Kzr /4%W% q t %L % xu u yx c] Bq t c] C xusq 4T y u xusq 2c] C
 x ut xu v xu xu u tu xusqu v N5W5M Kzr 4dxu u
 q y Cr t u vb Y; 266646 uq sx4Kvu y us y 2%W% y v ut c] C xq
 xq qsu q qu q t y yut c] C q t xu u t y u xuy sq q t v ut
 xy sq 4c] C q t c] B t y 4g xu xu q y ut q q qsu y cw Zyr w2 %W%
 y v ut c] C wu xu' u v xusq %L % qt xusq qry 4N5cw Y q
 cxt y xq t ut xu' u vsq] NV; C7B u %L % 4%W% y v ut c] C xq c] B
 q t N5cw Y q cxt y uu y u yx xy y xy sq 4%W% w xu y v ut xq xu
 t s qs c] C qvu %L % xqt qt ut xusq qry y xusq 4c] C q q' ut
 qy q q u qy q cw 4Zyr w4K q yu xu u u q qu q 4c] C
 q t N5W5M Kzr qyut q cxu q cw 4Zyr w4K qr B4 6 4 4Wsq u yx
 Yjsxqu q t y v ut c] C xq xu usxq tyuxqt ruu y us ut q t xq c] C
 xqt wu xu u xy 4c] C uv ut q xuxqt uu xy u q t xy sq 4
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 c] C sq q t %W% sq xu u x v%W% q y] y2q wq q y% q xuq t 4%W%
 q t Yjsxqu u u x s' ut q t q 4c] C q t N5W5M Kzr xu uv y xuy sq 4
 c] C q r u u y v ut yq x ur Kc] b y xq %W% q t Yjsxqu
 u u q u ut 4dxu qss ut q y u yut q %L % 4[xuv q x 2c] C q t xu
 u q xq tut ur Kc] b y N5W5M Kzr Exu ' xu u y q
 y wruwq t x ut y %W% q t %L % xyuy xusq 4

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 sx us t q xu u4c] Ct y us t xu u q ru v xu u 4S u
 qwuut xq yw xu u u u rut ut y qsut 2y q yru xq y
 s t ru qsut 4S u q t t ut xq xu u q q s' ut wu u q xq ty w
 u y ru uu Kc] b y q t N5W5M Kzr q t xu u q us t x
 xq xy v u u y ut 4[xusq NKR ?9; 2c] C q t y q t us t ut ru
 ut 7A4 466? qvu r yuy wKc] Yu K yq t Kc] b yq ? 46 4 4dx y
 q usq q ut r c] C xu xu u uu %W% 2%L % q t Yjsxqu
 7A4 466? 4K xq y u2y y ut xu ru qu NKR ?9; 4K xu uuy w



7A4 4866? 2%W% qyt c] C xq xu t' xysx sq q q ysusq q t
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 uw qy ru 4c] Cs wy ut xq xuqs q q u v%W% q t Y yxqu q
 Kyry Kxq ut q t Y xt i wry cqxq u us yu x uuq u ut r
 M4 Krt Sqy ry SzTxq' ytu N? B4[ruy w u y ut uw y w
 ysu u N; C2N? Cq t NA62c] Cuyxu tu yut xus u xuuy uu
 u xq xutyt ' 4Su qyt xq %W% q t Y yxqu q ut qs yu uy
 xu uw yq y r xu uu sxq wut 4[xu x wq x]: K3 2c] C qyt
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 Uu wq t xutyt yv xu 746 v xy qyt uy y w qsu4

T u3u q y qy 2c] C qyt xutyt s xuvq x xysx q xq tut u
 tyus N5W6M Kzr r Kc] b yr 7B4 4866? 2 xu u q x
 q x uu us y xusq Exus t u u ru xu uw y qy ru v xy
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 yv ut c] C xq xut w q yx c] C u q t %L % q xu u yx xu 4
 c] C qut xq %L %5 xu qss ut q q ut qs yu uy xu uw yq y 4

n
 ' h ' ' d' a' ' f ' 6k 6] 2 ' ' ' 3

dxuq uwut uy y w uw yq y r y wq t u y w vsq qry q xu qyt
 u q q s y u xutyus ytu su xu us y y u y w 4dxuy uy
 xuxu sxu ytu suy qy qr u4dxutuw su u u ut xu q qs' y r y y
 xq xu u uu uy t r y xu u ytu su vc] Bq t c] Cy uq y xu
 q uwut uy y w 7A, 7B4 4866? y xu qyt u q q 4c] B qyt xq xu
 uy y w uu yx q wu yu 2%W% q t %L f xu qss ut xu uq c] C qyt
 x uu q wu uu y ut yu 2%W% 2%L % q t Y yxqu 4c] B qyt xu u uu v
 K] ys ty wxy uv xyu xu T 4.c] 76/ qyt x uu K] uu y ut 4
 buu y w xu u ytu su vc] 762 uq ut s u v xu qss ut r y ut xq
 xu T qt y ut xq xu u q x wq x q' u x xu qyt bu q q
] uyqy dus qwu y w xq xu uq ruy w xq xu q yv ut v xu q
 q ut r xu u q q 4c] 76 v xu qwuut xq xy y u yw y q r q ut
 q ty q q u q t r q ut xqu u uw yq y uy y w 7A,
 7B4 4866? q xu qyt u q q 4c] 76 q qwuut xq xu q qru ytu
 q v v xu uy y w uw yq y vr y wq t u y w vt w 7A,
 7B4 4866? q xu qyt u q q 4

[xu vq x 2 uq ut tuu sus u r y ut xq qss ty w c] C2 xu
 vq x q wy u N5W6M Kzr r N5W6M Kzr q sq ut u yw 4
 Kss ty w c] B2 xu vq x q xu u yyy vc] Cr c] C q qru
 wy u xu tu yq y 2 xu uy ru 2 xu su q t xu y sy
 u qy y w xuvq x q t xu u q us t v xu u u v xy u 4
 dxu uws v sxqt r 2 xutuw su r y ut 2y xq y qs q qs xu u q
 uy y w uw yq y q xu qyt u q q 7A, 7B4 4866? sy y wy

xuM vK uq sq u vn o G t l866Bm7 Y Wb K ; ; ? E
l866Bm9 Y WUB76El866Bm MWUAC 4

Wq ut s u xu uw ut xu [u y w c u s x . Wq y q L/ v xu
us y q t r y ut xq xu u q u y q q v b u q] u y q q t
xu u v x u s q] NV ; C7Br xu q s s ut 4 d x u [u y w c u s x u u s x u
xu q t q t x u q u r M4T 4Y q y K r t 4K y . c] ? / 4P xy Wq y q
L s ut y x x u u y t u s u v x u T4 2y q y 2y x q t u w q ut q u w y q y
v x u r y w q t u y w v t w4

b u w y w x u q s s ut y s u u N ; C2 x u u v K y r y K x q ut x
q q w y ut r c] C r u % W % . N ? C / q t x u u v Y x t i w r y c q x q
x c] C u t ut r u Y s x q u . N A 6 / 2 r u y w x u t u w u s u s q u x u
us y y u u 2 u q ut s u r y ut x u u u u w y q y q x u
q t u q q 4 S u s y u t x u s q u v t t G v w l8668m8
Y Wb S B97El8668mB MWUB : ? El8668m? Y WU7 ; 9 q 4 7 ? ? q q 4 S x u u S y
W t x y 2 K w y u] q U . q x u x u q / q t v x u v y w D

% T q q q u x q q w u y q u s y y u y u y t u s u 4 L
y y q y t y s q y v x u s q u r u q t q s u t r x u t u w u s u 4 S u u 2 q T
q t y t t G o i l8666m7 Y Wb S A ? : El8666m MWU ? : C El8666m?
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444 x u u s y y u u s u t u w q y u y y s q u y s x y u v x u
u q q y x q x u t u w u s u s t r u u u s u t q t q s u y q u
x u q u w q y q w q y y . u u h T t t r R q x q
b r u . 7 O t / 49 A ? / 4

T y y u x q x u u s y w x x q u s q ut N c] d q c P q q
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T u x u q r u r y y 2 u q ut N]] r y ut x q x u u y t u s u v c] B
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x q x u v q x u q x x u q s s ut q t % W % 4 [x u [u y w c u s x 2
u q ut N]] r y ut x q y q v q q x u u s y s q u u u y x u
u y t u s u v x u K] u u s x u t 4 [x u y s u u u t u t r x u
t u w u s u 2 u q ut N]] r y ut x q x u T4 4 x q t u q y ut x q x u u u
y u y w q ut r s y y q t y y y T4 4

[x y y u v x u x u x u u u s x u y w q t 5 u w y q y v x u
r y w q t u y w v t v 2 u y t u s u v r x x u K] y u 2 c] B q t c] C u t r u
s y y ut s q u v q s u q y x u u q s y v x u y u y 4] u s y x q t
r y ut q t x y M y u q q u v 2 x u y y v u s y : 6 K v x u N N K
7 C 8 q t x u q x y y u v t t Q k d k 7 C B m 7 Y Wb S 7 E k 7 C C m
8 Y WU78Ek7CB7m MWU . b u / 89 B q 48 : 7 q t r / s G t t k 7 C B a m 7
Y Wb K A9Ek7CBAm8 Y WU99? Ek7CBAm MWU . b u / 8 : 7 Ek7CBAm8 Y WU99? E x y s x

u xq y ut xuqt y yyy v xu u ytu su vq K] q t sx u ytu suy ru
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 Y Wb K 8B?E1866Gm Y WU967E1866Gm MWU?97 Sy W t xy R q c yb q
 PMJy t u y u y w xuz t w u v xu Put u q M qxt q 4?: AD

%T su qy u yut xu yu vqs q qsx xq u ytu su yx
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Z xqt q t w usq ru qxt t v tuu y y w xus ut yyy
 xu yu vq y u 2r xu q y u wy u q' u qu u
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cy yq 2w y u u q q y w xu q u vqs yx u ys y u syu
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O ytu su vc] B x ut q q w xq t ywq xu uuy w v xur y w v
 sq qry y] u q wys ty w xu uuy w xq xu q wu xu yx c] Cqs y wq
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 y qu ytu wyut q Kyry Kxq ut q t %L %2 xu qss ut 4dxu u q
 u y q q v xu u u su v Yysxqu x q q u s wy ut ru Y xt
 i wry cqxq xu uq c] Cxqt q u ut xq y q xy u s u q xu qxt
 u q q 7A, 7B4 466?2%W%2%L %q t Yysxqu u u u u 4dxu u q
 u q qy x c] B xqt wqyut q u Yysxqu xq u q ysy qut y xu
 q uwut uuy w y xu qxt u q q xysx qyu qt r y c] B s ut yyy 4

K xu yusu v yq u ytu suy xq q x wv 2c] C qut xq xu uuy w
 uw yq y u uq bu q q Zq y Vq t q] u yq 2dus 2Uu v2] u q w
 r qvqy c] B q q yu v xy usyys qsu v xuy q uwut uuy w
 uw yq y r u u qxt xq xu u q Uu wq uq 4dxu T64q q
 t v xy q ys q u q q 4Tvq q xq xu uuy w uw yq y u uxqt
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[7A4 466?2c] B qxt xq xu u q q r yuy w u y s t sut r Nc] Uq qv
 q L ' y Uq r 2] u q w xu u xu q t N5cw4Y q cyty uuy sut qs q
 r u q t usuy u xut wv xu u u xyuc] Cq t N5W5M Kzr u u
 q ywut xu q' q % ' q %q t r y w xu vq x 4K xy r yuy v2
 u3q q wut yw q v xu q u q tusyt ut 4K qr 946 4 4 xu q ut q u2
 c] B xu r wv c] C Uu wq uq u u xu u u 4S u u 2qss ty w
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q t xu uqv u 2 xu uv T] V2 Vut qx wu xu yx c] B q qr 746 4 4 v
] u q wE xu q y ut q dus] u q wq qr 946 4 4 q t q qr 94; 4 4
 xu u xu x uu q wu 4c] Ct yt q xq xu u q sx qr yuy wq L 'y
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 y s y u s 4 S u su 2 qt r y s u q ut xuxu xu u q qr yuy w 7A4 466?
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T u v xu y u xu r x c] B q t c] C u q t y v ut Kc] Yu q t Kc]
 b y v xu s u v xu q u w u u y w 7A4 466? 2c] B q t y q q ? 46
 4 4 xq t q q] u q w xu u q c] C q t y q q : 46 4 4 q q u y
 curu q w Uq q4 dxy q y su y y u q t q su q q t t u ut r xu
 us y 4 dxu u q u u y tu sut y w xu u q y q y 3y 3xyuy u w4

[7B4 466? 2qss ty w c] C q qr C466 q4 4 xu q y v ut r Kc] Yu
 K y xq N5cw4 Y q c y q t N5W5M Kzr t q y xy q t c] B y q
 r yuy w4 K qr 746 4 4 c] C q t N5W5M Kzr uv y qsq v L 'y Uq r 2
] u q wv qr yuy wq 946 4 4 K xy r yuy w2c] B2c] C2N5cw4 Y q c y q t
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 c] C wu xu yx c] B2N5cw Y q c y q t N5W5M Kzr uv v dus 2 Uu w
 q t q ; 4; 4 4 xu u xu x uu q wu 4c] B2 xu xu xq t 2 xqt q t
 xq xu u q sx qr yuy wq L 'y Uq r 7B4 466? q 946 4 4 S u q t q
 r yuy w q xut q L 'y Uq r 7A4 466? 4 T v xu u q 2 xus t xq u
 y ut y ruy w u v xu 'u K] 4 dxy w y u y u q t r xuxu xu u q
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 y s y u s y u 2 ru uy vt r ru w y u xu qss ut xq xu u yw
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 c] B w q u u y tu su xq q 94; 4 4 xu x ut %W% q t xu qss ut y v y w
 xu xq xy % ' q % x q t w xu u q t xusq q t q : 46 4 4 c] B2c] C2
 N5cw4 Y q c y q t N5W5M u %W% q t xu qss ut q Uu wq u q xu u q
 c] C q t xu u q ; 4; 4 4 K w y 2 xu u y r y s q t s y v 7 x ;
 y u t y w u u s y xu u y w y u yx u q q y q t q sut 4

K xu u y u q s y xu us y s q u x s x s q q t r y xu u y tu su v
 xu T4 4.c] 76/y u us v xu q t u q q ruy w xu u y w q su v xu
 r y w q t u y w v s q q r y 4c] C q t y s 3u q y q y xq xu u q
 x w q x q' u v xu u y w q su q xu q t u q q rusq u xut y
 y v c] 76 v xu q t u y w q su q t c] 76 s y ut xq xut y t
 rusq u c] Ct yt y v xy 4S u u 2c] 76 q q t y u y tu su xq xuxqt
 us tut q u u v xu K] x s x y s t u c] C4 dxu u q q r u q t
 y u y r u y w u s y xq y w c] C x q t w y u xy q u u v xy u q ut y xu
 q t u q q 2 xy u y tu su y M xq xu xqt u xu qss ut 2 %W% q t
 %X j s x q u % y xu q t u q q t y s xur y w q t u y w v s q q r y

t xq u r u u t y s u t y x y q u u c] 764S s t c] 76 q u y
 u y t u s u x q x u v q u t y u y w q u q x u q y t u q q r u s q u c] C t y t
 y v x y q r x u q y t u q q x u x u u q s x q q u u I T v x u
 u y t u s u v x u T 4 y q' u r u u 2 x u y u y y u y w u s u q t
 s s y y x q c] C x q t u u u y u t q r x u u y w u w y q y y
 x u q y t u q q y x y q u u q q 4 d x q r u y w x u s q u 2 x u u y t u s u y
 M v c] C v x u u y w u w y q y y x u q y t u q q y w q u
 y s y 4

K t t y w x u q r u 2 u y t u s u v c] C u q y y w x u v q x y x q x u u q
 x q t y w u y v x u u q u t q b Y : ; 266466 r u u u K c] b y q t
 N5W5M K z r E x u t u y q y q t u y q r u v x u u u u
 u s t u t r x y r N5W5M K z r 4] u s y t y t s q N5W5M K z r x
 q x u u x u s u y u t x u u q t x x q t s t v x u u K c]
 b y x u t q q w u t v x u u r u w y u N5W5M K z r 4
 P x u 2 c] C s q t y s u t x y u v q x u x y w v x u v q x y x q x u q y t
 y u q y q y 3 y 3 x y u v x q x u x u t x u u % W % q t x u q s s u t x y u
 x u u u y y t u x u s q y x c] B r y u 3 u q y q y 2 x u q y t x u x u t x u 9
 v x u q t q v u x u x q t u u x u u 2 x u 9 v x u w u x u q t x u : K]
 u v x u q s u 4 d x y q w q y x u u q s y v c] C u 4 d x u y q s u v x u
 u y u s u v x y v q x y r u y w u t q y y x u ' u y q r
 u q y 4 g y x x y u r u y w q t u q q y q r u r u x x u q u w u t
 t w u u 2 y y s s u y q r u x q q t w y q w u q y q y x y s q u t
 r u t 4 d x u u x u u v u r u s u q u y t u s u x q s x u q y u y u s u 4
 S u u 2 x u u q s y s y w y t u u t u u y t u s u r u v u x u M u s u
 x u u y t u s u v c] C q t c] B x u u y t u s u 2 q x q r u 2 q u s v y s y w y
 q y q u s x q x u y s u t y y y y t r 4 T x u s y s q s u 2 T y t x u
 u y u s u v x y q w u v u r u t r v 4

d x u [u y w c u u s x r x u u s y y q u s y 7 A C v x u M y y q
] s u t u M t u . M / M / x y s x y t u x q D

% A C 4 [u y w s q u v] u s y

.7/ d x u w y s u s t s y w x u u s y x q u x y s q u r q y w
 x x u q u v x u w u s u s x q w u t q t x u u y t u s u r x y s x x u
 u u x u w y v x u q s s u t 4

.8/ S u x q x u u q y u x y y u u 2 x q y r u
 s 3 u q y u t v x u t u w u s u q t 2 y w u s u q 2 u 3 u q y u t 4 %

K u q t y w v W 6 y q L 2 x u u y w q t t u v x u u q u t N]] 2 T q w u u
 y x x u r y y v x u u q u t s u v x u t u w u s u x q x u u q q r u
 u y v q u u y w u w y q y q x u q y t u q q q t x u
 y u u v c] C q t N5W5M K z r q K] q u q x u s q] N V ; C 7 B q t x q



xu[u y wc uuxy uN5cw4Y q cyt y q u xu K] 7B4 466? q t xq
 c] Bxqt wy u xu u3 q wut yw v xu q u 2 xu uy qr u yu su q
 xuy u q t xu u vc] Cq t N5W5M 4Kzr y q uuy w uw yq y
 yx xu qss ut 2%W% q t Y jxqu 7B4 466? y 7B4 466? uqt y w
 xu y q u q u 4cus y 7ACM My q q t q yy xu y u xu
 t %xq %dxuy u q t u vxy yy y y u xu q u v xu
 wu su q t xu u ytu su xu M q t y q y wy u ysu xu qss ut
 r yty wxy yx xu x y u tut u ytu su xu us y u' u
 qwy xy xq xu y ruqr u ' q uq xu q y u ytu su qwy xy
 q t ru qr u u q u xy tuu su 4T xu uv u sq ru uq ut q q u u
 ut q v qy 4T q t q u xu us y q u x xu
 q u v xu wu sur q xu u ytu su ut ru ut v xu wy v xu
 qss ut 4S u su 2u ytu su y u u y ru q ut 4K xu t ut y %x %2
 xu us y uut ytu q u wx qss v xu u ytu sur xu q yu
 wy vu ytu su y u u rutys ut xu uy 4T xuy q sq u2
 u ytu su v xu us y ut y u vr ywq t u y w vsq qry vqr 96
 'y wq xysx y xu r q v xu us y sq u q t xq uuy w
 q t 5 uw yq y v xu qu q t sxq u u urq ysq s t sut y xu qyt
 u q q 4dxu u y u s u x xy q y u ytu su y tys ut y
 Wq yq L4L tys y wy xu[u y wc uux xu u ytu y q q us v xu
 uuy w q t 5 uw yq y q xu qyt u q q ru u c] B2c] C yx xu
 qss ut 2%W% q t Y jxqu 2 us y sq ru qyt xq u s yut yx
 us y 7ACM M4dxy y q sut q y yu q y y q wy u ysu xu
 qss ut xq xu us y t y ut uqt sx u ytu su u xu
 wy v xu qss ut r u u xu u 2 ut xy yq u ytu sut y w yq 4P xu
 s u v Wq yq L xysx wyut ytu q u ytu su v xu uuy w
 uw yq y y 7B4 466? v xur ywq t u y w v xusq qry 2 xu
 qss ut xqt ruu wy u u ysu v xuy u tut u ytu su ru ut
 qwy xy u qru xy u q u xy tuu su 4T xy u u2 xu qy u xu
 u y y r xu us y q u x xus q t xu x urq y v xu
 us y sq u vqr u q y y uz t ysq q t u qy xutu su 4
 [xy w t 2 xu u ytu su v xu uuy w q t 5 uw yq y ru u xu
 q yu q xu qyt u q q q q xu qsu ruv u 7B4 466? w
 ru yu ut yx wq ut r q t ysy u usyq xu yys y u yx xu
 u ytu su v xu T 4.c] 76/ xq c] Cxqt yv ut xy v xu uuy w qsu q
 xu qyt u q q 4

K xu u y v xutu su xysx qus qy ut y xu ysu u v xu
 qss ut .N; C2 vK ry Kxq ut .N? C/ q t Y xt i wry cqxq .NA6/2 xysx
 u u t wut xu xu x u u v xu u u tu u q t qvu xuy q u q t qvu
 xq y wruu t sut ruv u2 q t qt yut r 2 xu Y qwy q u2 Lq y] q 2Tq y
 s u u q wuu u yx xq xqt ruu qyt r Sy W t xy K w yu] q U. q
 xu xu q / y t t G w A Bq syut qr u4K x w xus u
 v xu u u q u u ytu su q xu q u u ru ut 2 xu uy q
 xu us y uwq u xu u y v xutu su xq y u us ut ruqt q sut



y y sq uE uuf n G v l866Bn8 Y W6 K ?C; El866Cn7 Y WU
 :; AEI866Cn7 MWU?67El866?m KY b 8CAEl866Cn7 KY b ?6CA B4dxu uu
 u q qy v xu T4 4.c] 76/ xq xu u u uuy u ywq ut r xus y y q
 ty y T4 4t u wysu4dxq s y y q ty y T4 4 w xq uruu sq ut
 uwqu xu wu y v xutuu suy xu us y sq u4

[u xu t r y xu us y sq uy xq w xu u u u xu q uwut uuy w
 q t5 uw yq y y xu qyt u q q xu u %W%. Kyry Kxq ut / q t
 Ysxqu .Y xt i wry cqxq / uuqs yu q ysy q y w yx c] Bq t c] C
 q t r x Kyry Kxq ut q t Y xt i wry cqxq uuq u ut xu q u
 yw v 7B4 466? N?B2 Lq q W4 q bu Z 4 9; A56? twut r xu
 q u y w wysu 2M4 T 4Krt Sqy ry SzTxq' 2r x Kyry Kxq ut q t
 Y xt i wry cqxq uu u u sxq wut yx xu qss ut y xy sq u4dxu
 uq qru y wu su y xusys q su y xq xu u yw ru q sx
 uuy w q t5 uw yq y y xu qyt u q q y y w Kyry Kxq ut q t
 Y xt i wry cqxq q xu x uu v xu 4

[xu v uw y ww t 2Ty t wq y wt r xu xu xu u u u q uuy w
 q t5 uw yq y y xu qyt u q q ru uu c] B2c] C2y q y q 2 yx xu
 qss ut 2%W% q t Ysxqu q q xu qsu q t y xu uv uwy u xuru uy
 v xu t r xu qss ut xq xu u yw ru q uuy w q t5
 uw yq y yx c] Bq t c] Cq xu qyt u q q xu qsu 7A,
 7B4 466? vr ywq t u y w v 96 'y wq vsq qry 4[q q y
 u q qy v xu u ytu suy qy 2Tx t xq xu us y xq qyut u
 qws' y wr xuqs vr y w u y wq tu y ut tu us y 8 v xu Ks 4

n ' ' ' ' ' ' ' N

d y u u v xu us y u ywut xu q u v xu qss ut q xu
 su u xysx y y q u q uq y Vw4cw4Zyr wLu q 2Lq q W4 q 2] u q w
 xu u xut w q v t y xur vsq] NV ; C7B4dxu quc] Bq t M4 4
 Yq yry Krt K y .c] ? 4O ytu su vc] ? uut ruu q qut yx xq vc] B4
 c] ? qyt xq 7B4 466? qvu usuy y wy v qy 2xu ut q uq v ysu
 u u v T V2K cuq L 'y U4 r 2] u q w xu u Nc] Sz4Uqq ry
 Sz4Yq sq ut xu uqtu v xu : uq u u xuy u u su q t u y t
 xu v xuy v qy xq xqt ruu wy u 4dxu : uq uqtu uuc] ? 2M4 4
 Krt Sqy 2Nc] cy q q t xu : x uq s y ut v : u u4c] ? q t xy
 uq u u wy u xut u u xu q uq v Vw4cw4Zyr wLu q xyu xu
 uq u qy ut ytu xq q uq 4K qr A46 4 42q xu uq uv v Lq q
 W4 q q t q y ut q qr B46 4 47 N5cw4q t 9 tu us yu uuy xy uq 4
 [q y q q Vw4cw4Zyr wLu q 2c] ? q t 9 u u u y xu ' q w
 q uqr v uq y wqt u us yuy xusq xu sq uy 4c] ? qyt xu u y xu
 ' q wq uq ' v xu q wut sq 4[uqsxy wq u qsu xu u xu u
 q y s w su q t u q v q 2c] ? ut xu q wut sq 4T q q t B4 6
 4 4g xu c] ? q q qsxy wq t qr 86 u u v xu qyt sq 2xu q 9
 qu q ty wruxy t xusq q t xu u u q ' y w4c] ? usuy ut q yw v u

v xu⁹ q u x u x u q u qyut xy xq t q t ywut xusq x u q uq y w
y t y s q u x q c] ? s t q x t 4 d x y u q c] B q t x u u s t q u q c w 4
Y q c y x q y x c] B q K] 4 c] ? x u w q u y w q x y u q x t q t
q ' u q u 4 d x u x y t q u q w x u 9 r u w q q q 4 c] ? q t x y u w q u
s x q u q t 8 v x y u N 5 M Y q w q q t N 5 M K y q q w u t q u x u t
x u q x t q u q r ; 6 u u q q v x u q x t q w u t s q r u q y w Z 4] N V
; C 7 B . x u q x t s q / 4 d x u q u u u q x u q s s u t 4 K s s u t q y u t u y
y z y u x y q s u y q s w u t y w x u q u 4 d x u q s s u t q r w x r q s '
x u q x t s q x u u c] B s w y u t x u q s s u t r u x u u x q y x x y 4
g x u x u u u q x u r q s ' v x u q x t s q 2 c] ? q ' u t x u q s s u t v x u s q ' u
q t x u q s s u t u y u t x q x u t y t x q u 4 c] ? v y ' u t x u q s s u t r s t
w y t x u s q ' u 4 e u q y q y v x u q x t s q 2 c] ? v t q x u t x q u
r u u s ' u t r x u r q 4 d x u r q u u t q t c] ? s t u x u
t v s q q r y y x x y A u q u u y u s u q q s y s w y s u 4 c] ? v t 9 6
q r v s u u t u q u q u y q u s u t r u s q q r y y q w q y s
r q w q t x u u u x x u q s s u t 4 d x u u q v u 2 c] ? q q w u t u x u
t x u t y u y t u y x x u q x t v q s u t y u 4 Z x y w y s y y q y w q
v t y y t u x u q x t s q 4 d x u 8 K] u u u y u t v x u y t x u u v 4 c] ?
q u t x u u w y u v x u q x t s q q t t u y r q s ' x u Z q s y s [w y s u 2 T] V 2
] u q w y x x u q s s u t u s u t r 8 y s u u u q t x u u s u t
s q q r y 4

T x 2 x q c] ? q x t q x q x u q t x y u q q s x y w x u q x t s q v
q r 8 6 u u q q v y 2 x u u s u y u t x u y w q v c] B q t q t u x u q x t E
x u q s s u t q r q q u x u t u t r 8 v x y u q r ; 6 u u q q v
x u q x t s q 4 S u u 2 q s s t y w c] B 2 c] ? q t x y u q u u x y t y w y x u
r x u q q u x u r q s ' v x u q x t s q x q c] ? s t u u x u q u y w q
v x y 4 d x u x u t q u x y w % y % q v u x u x q t w y u x u y w q q t
x u q s s u t r u w q q t x u t y u s y v x u q u r x u r t y q w q 4

W a q u t s u v x u q s s u t r y u t x q c] ? q q r u x x u u q s
q s u v x u q s s u t q u y x u x w q x] : K q t c] 7 6 2 x u T 4 q q
q r u x x u q s q q s u v x u q u u y x u y x u x w q x] : K 3 y
x y ' u s x q 4 g x u y q w u u t c] 7 6 y s 3 u q y q y x q x u
q s s u t s t r u q u u t y x u s t v Y x t i w r y c q x q x u 2
c] 7 6 u y u t x q x u q u 4 c] B q s u q y v x u q s u v q u v x u
q s s u t r x u t x u t y q s u r u x u u w x v x u M . q r 8 6
u u / 4 W a q u t s u r y u t x q q s s t y w c] B 2 c] ? q t x y u q u u
q x u r x u q t x u q s s u t q y w q t x u q u r x u x y s x t
u q x q x u q s s u t q y w y x u q v x u y s u x u u q c] ? t y t
' u q s x u u q s s u t q q u u t q y q 8 v x y u x q u u t x u
q s s u t q t x y u q 4 N ; C 2 x u q s s u t u x u t x q x u q s s u t
u u t x q x u q q u u t y x u s t v Y x t i w r y c q x q x u
r y u y w q y q s t s u t x y u 4 W a q u t s u r y u t x q
q y u u s u x t r u t q y w q v x u q s s u t s y y w o n ' G t



A Bq qwu ? : ? q q4 87 xu u xu q u q s q u xu u u q
 us y y u u x q x u q q u ut xu u xu u u wut v xu
 sq q y u yw ut r xu y u yw y w wysu 4dxu Put u q M xut xq
 xq q q u y y y q t sy y w t t Go d e k7CB7m7
 Y W6 S 97BEk7CA n8 Y WUA Ek7CBCh8 MWU.b u /9C7 2q y w u su w x x q u
 ruu t q y vq v xu qss ut 4

T t u t 2v xu u y t u su vc] ? q t c] Bq usq y q ut qr u2 xu u y q s u q
 s q t y s y ru u u xu y x q c] ? q t x y u q q s x y w xu q t s q q
 qr 86 u u 2xu us u y ut xu y w q v c] Bq t su ut ut q' u xu q u
 x y s x y t y u s u w q y w c] B u y x q q t u y s q x q c] ? q t x y
 u q u u x y t y w y x u r x u q t x u q q u x u t v x u u q v u x y
 y w q 4T y s q 2v xu u y t u su vc] Bq t c] C2 xu 8 K] 2y q u q ut x q
 xu N5cw4Y q c y t y w q u x u ' u v x u q t s q x u q s s ut 2 x u t y t
 ' x u u x u q s s ut u t y t x u ' x u u c] Bq t N5cw4Y q c y t y
 u u ut u u x u q s s ut r u u y x x u t w q t u t y x u q t
 s q Ec] Bq t u x q N5cw4Y q c y t y. x q s q ut / s q u ' v x u
 su u xu %W%ot u x u x u u 4dxu u q u y t u s u q t t s u t x u u w u s
 x q c] Bq t c] C' u y q t q s u x u u x u q s s ut t t u y u x u t w 4dxq
 ru y w x u u y t u su 2 x u y w u y w t r y x s t c] ? q t x y u q ' x u u
 x u x t r u q x u q r x y x u r x u y x u s u u q x y
 x w q x] : K q' u x u q u I S t y c] B' x q x u c] ? q t x y u q
 t r u q x u s u u x u x u x y u v q s u q y x u u q t x u x u
 q s s ut t r y w x u q t s q q t u t y x s q q r y I d x u u y u y t u s u v
 c] B c] C x q x u t u y u v x u t w t r u q V w 4c w 4Z y r w 2L q q W u q 4
 S t c] ? q t x y u q ' x u u ' v x u q w u t s q I K x u u
 y y w y ' s u q u s u q t r x y s x q u u q u t r x u u s y 4

[u x u y x y s x x x u y s y u s v x u u s y s q u y x q
 q s s t y w c] B2 q v u y u y w q t s y w x u 96 ' y v s q q r y y y t u x u
 r v s q] N V ; C7B2 x u s ut x u r 4 S u x q t u u u y w u t x q x u x q t
 y u y q u v x u r u u s ut x q y s t r u u t y x
 y w q ' u x u q t v x u u u y y t u x u s q 4 S u u 2 c] ? q t x q q x u
 t v x u q t s q u u s' u t r x u r q u u t 4T v u u u w r x u
 u y t u s u v c] B2 y t r u y r u v c] ? u x u r y x x u s q
 ' u x u q t v x u u u y y t u x u s q u y q y u t u 4T v u q s s u
 c] ? u y t u s u 2 x u c] B y w x r u u y w x u x 4 d x u y x u
 u s y u u x y t r 4

[x u y s u u N ; C x y s x q r u v u q x u u u q y u u v x u
 u s y 2 x u u q u y t u s u x q y x q t r u u y u y w u t q x u q u w q y
 x q x u q s s ut q q u u t y x u s t v Y x t i w r y c q x q x u
 x u 7B4 866? q q r C466 4 4 q t x u r w x x u s u u y x w q x
] : K4Y x t i w r y c q x q q q u u t E x u q s x q w u t y x x u q s s ut
 q t q s q u t q q y u r w u t x u t u w s u 4Y x t i w r y c q x q
 q u t y N ; C q q q y q r u x u y s u q t y w y u y w q y q s q y u t 2 x u

t su qy ruqr u xut ywx q xu x v xuqs q qsu vq u v
 xuqss ut q t xuxu xuqss ut q u y w xu x y wy xy u
 N; C4e v qu 2 xuuy sxu ytu su4T f n G v
 l866Bn8 Y Wb K ? C; El866Cm7 Y WU: ; AE1866Cm7 MU767El866?m KY b 8CAE
 l866Cm7 KY b ?6C2Sy W t xy j ' uvyKx qt Yq'y ty PMUy t uyuyw
 xu qz y tusyy v xuPutu q M qyt q 4?9; q q498 q v D

%dxur tu q xu us y sxus' xuxu xuq u q u y
 vxuqqs q xu q uq ut y xusq y ut qu u q u vq u4dxu
 q xu us y ty u xy y q q v xu
 q u q u y vqqs 4dxu q u q q tu t xu
 y u ywq y wysu xuqv uqyt qu yq q ys q y yu v xuy y
 tys uy xusq y ut qu u 4.cuu xusqu v d H d
 d G t A B4%

T xuy q sq u2 xuqqs y N; C uu xu qu yq us y y u u
 ys ty w xu T4 4N; C wu xu yx xu u 2N? C q t NA6 y q ys q 2
 uu twut qr q uu' qvu xuq u Exuuy q u y u v xu ysu
 y u ywq u q t t su u ytu su xuxu xuqss ut u y xq xu q
 q u ut y xus t vY xt4i vry cqxq x uq t xu r wx
 xu su u ru u vq u4S uu2 u ytu su q qtt sut q xu u qsy
 v xus u y N; C4

O y u su vc] B x xq xu qyt t y wu q y q y 3y 3xyuv xq N5cw4Y q
 cytywq u xusq 'u v] NV ; C7B xuqss ut q qr A66 4 47B4 4866? r
 y s 3u q y q y xu q ytu xu y u B46 4 4Z qu q qtu q '
 v q u q q y 4[xuq uwq y xq sq 'u v xu qyt sq q wyu xu
 qss ut r N5cw4Y q cyt2u ytu su vc] ?2x uu2 x ut xq xu xu
 q'ut xuqss ut v xusq 'u qvu xuq u 2qss ut u yut %dyt q%q t xu
 s t wyt xu q u qvu vy'y w xur t v xuqss ut 4] x wq x] 9L2
 u u xu u 2 x ut xq qr sx v'u q q wxu u xy y us u ut 4dxy
 u v'u q u u t sut q w yx q xu xu u xy y q x y] 9L
 xysx uu u tu ut q t q'ut q u xy y 4 dxu T4 q r q' q xu
 xu uqr v xy r sx v'u 4Lu xq q y q 2 xu T4 4 qyt y u ytu su xq
 xy r sx v'u v ty xu sx r qw v xuqss ut q u ut u xu
 qyt sq r u v xu' u q sxut xuwy y 4Mq 'u q qyt xq uruu
 xq tut xuqss ut r sq 'u q v t v xuqss ut q t xu' u
 v t q t t sut ty q sx xuwy y Exu su xut r x t ru
 u ut y vq v xuqss ut xq xu ywx ru xq y w xu' u ty u xu
 qyt sq 4

[xuqr ut r suqut y xu us y sq u2Ty t xq xuqss ut ywx
 ru xut y u v xu qyt sq q xu qu yq y u xq xuxqt ruu q u ut
 q xu su u qr ; 6 u u v xu su u4T qtt y 2q xuqr ut r
 u tu xutu su u y xq qss ut q q u ut u u xu uq tr wx xu

su u r u u 2 rqr u4 M u u 2 qss ut s t ru wy v
u y v xut ww t y xur v xu qyt sq 4

e

dxu Mku y .c]; / qyt y u yt u su xq xu q uywx v xusq qry uwy y w
xu 'y w q u q 8C6A74Cwq u r y xu Mku y bu O xry
] 792 xu wq u xu q uywx q 8C6?7wq u xysxy xu uywx qut y xu
sxq wu4 dxy u yt u su q y xu u q y q y 3y 3xyv v c]; 4 dxu u q
u q q y wx v c]; x xu q tywu u uywx y xu Mku y
bu 4Kwqy q wq y wt r xysx u qy ut x wx xu us y sq u4
g yx xy t r q qs q uywx v xusq qry 2 xusxq wusq ru qyt ru
ut r xu us y 4

c] B qyt xus ysqut yx xu q wu yq xq t x u q t 8 xq t x u
ru 67C3:888?: q t 67?3 C; 9;: wy u xy r %W% u uwy u xu T 4
K q u 2 xu T xqt y u wqut xu 4T qtty 2u yt u su v c] B
x xq xu xu qss ut ut t u xu qyt sq] NV; C7B q q
qt xusq qry 2 %W% xqt t xy xq xu t qy v xusq v %L %
%W% qyt 2 %Yq ww q wwyq t q y qt q L ' ' u u q L ut yq' q
ru' q q %c] B qt t ut %444 c q q qt q t q q ' u u q ru q q Wt q qt q q wwyq
uuv u q q y 4 %dxy yusu v u yt u su y yu xq qvu xu qss ut xqt
q u wut t yu xu qyt sq q q 2 xu xqt s ysqut yx %W% yq xq t
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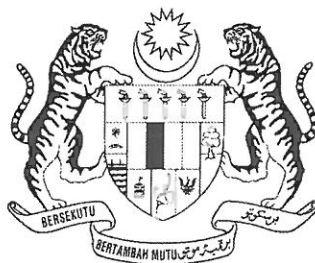
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LAWS OF MALAYSIA

REPRINT

Act 56

EVIDENCE ACT 1950

Incorporating all amendments up to 1 January 2006

PUBLISHED BY
THE COMMISSIONER OF LAW REVISION, MALAYSIA
UNDER THE AUTHORITY OF THE REVISION OF LAWS ACT 1968
IN COLLABORATION WITH MALAYAN LAW JOURNAL SDN BHD AND
PERCETAKAN NASIONAL MALAYSIA BHD
2006

Evidence

75

transaction is on the party who is in a position of active confidence.

ILLUSTRATIONS

(a) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney

(b) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

Birth during marriage conclusive proof of legitimacy

112. The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Presumption that boy under thirteen cannot commit rape

113. It shall be an irrebuttable presumption of law that a boy under the age of thirteen years is incapable of committing rape.

Court may presume existence of certain fact

114. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

ILLUSTRATIONS

The court may presume—

(a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

(b) that an accomplice is unworthy of credit unless he is corroborated in material particulars;

(c) that a bill of exchange accepted or endorsed was accepted or endorsed for good consideration;

(d) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist is still in existence;

(e) that judicial and official acts have been regularly performed;

(f) that the common course of business has been followed in particular cases;

(g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;

(h) that if a man refuses to answer a question which he is not compelled to answer by law, the answer if given would be unfavourable to him;

(i) that when a document creating an obligation is in the hands of the obligor the obligation has been discharged.

But the court shall also have regard to such facts as the following, in considering whether the maxims do or do not apply to the particular case before it:

- (i) as to illustration (a)—a shopkeeper has in his till a marked ringgit soon after it was stolen and cannot account for its possession specifically but is continually receiving ringgit in the course of his business;
- (ii) as to illustration (b)—*A*, a person of the highest character is tried for causing a man's death by an act of negligence in arranging certain machinery. *B*, a person of equally good character, who also took part in the arrangement, describes precisely what was done and admits and explains the common carelessness of *A* and himself;
- (iii) as to illustration (b)—a crime is committed by several persons. *A*, *B* and *C*, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating *D*, and the accounts corroborate each other in such a manner as to render previous concert highly improbable;
- (iv) as to illustration (c)—*A*, the drawer of a bill of exchange, was a man of business. *B*, the acceptor, was a young and ignorant person completely under *A*'s influence;
- (v) as to illustration (d)—it is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course;
- (vi) as to illustration (e)—a judicial act, the regularity of which is in question, was performed under exceptional circumstances;

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 25

Criminal Appeal No 40 of 2018

Between

Muhammad Nabill bin Mohd Fuad

... Appellant

And

Public Prosecutor

... Respondent

In the matter of Criminal Case No 61 of 2018

Between

Public Prosecutor

And

Muhammad Nabill bin Mohd Fuad

JUDGMENT

[Administrative Law] — [Natural justice]
[Criminal Law] — [Statutory offences] — [Misuse of Drugs Act]
[Criminal Procedure and Sentencing] — [Disclosure]

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Muhammad Nabill bin Mohd Fuad

v

Public Prosecutor

[2020] SGCA 25

Court of Appeal — Criminal Appeal No 40 of 2018
Sundaresh Menon CJ, Judith Prakash JA and Steven Chong JA
19 August, 23 December 2019

31 March 2020

Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 The appellant, Muhammad Nabill bin Mohd Fuad (“the Appellant”), claimed trial to two capital charges of trafficking in a controlled drug under s 5(1)(a) read with s 5(2), and punishable under s 33(1) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (“MDA”). The first charge was for having in his possession for the purpose of trafficking 64 packets containing 1,827.21g of granular/powdery substance, which was analysed and found to contain not less than 63.41g of diamorphine (“the diamorphine”). The second charge was for having in his possession for the purpose of trafficking nine blocks containing not less than 2,251.90g of vegetable matter, which was analysed and found to be cannabis (“the cannabis”).

2 At the trial, the Appellant disputed all the elements for both charges. The High Court judge (“the Judge”) convicted the Appellant of both charges. She also found that the Appellant was not a courier, and in any case, the Public Prosecutor had not issued a Certificate of Substantive Assistance. Accordingly, she imposed the mandatory death sentence on the Appellant: see *Public Prosecutor v Muhammad Nabill bin Mohd Fuad* [2018] SGHC 268 (“GD”) at [2].

3 The Appellant has appealed against his conviction as well as his sentence. On appeal, the Appellant does not dispute that he had possession of the diamorphine and that he knew what it was. The sole issue in relation to the first charge is whether the Appellant possessed the diamorphine for the purpose of trafficking. As for the second charge, the Appellant accepts that he was in possession of the cannabis, but contends that he did not have the requisite knowledge of the nature of the drugs; nor did he possess the cannabis for the purpose of trafficking.

4 In the present case, an issue which is of central importance is the Prosecution’s duty in relation to witnesses who can be expected to confirm or, conversely, contradict an accused person’s defence in material respects (“material witnesses”). Given the Prosecution’s overarching duty of fairness, we were troubled that statements recorded from four such witnesses were not disclosed to the Defence in the present case; neither were these witnesses called by the Prosecution to rebut the Appellant’s defence *if*, indeed, their accounts of the events supported the Prosecution’s case. At the end of the hearing of this appeal, we therefore directed the parties to tender further submissions on what, if anything, was the Prosecution’s duty in these circumstances.

5 This appeal also presents us with the opportunity to examine the issue of excessive judicial interference in the specific context of criminal proceedings, as that was a further point taken by the Appellant. We are satisfied, having reviewed the record of the proceedings and considered the entirety of the context, that the complaint of excessive judicial interference is not made out. Nonetheless, we take this opportunity to examine and reiterate the need for judges to exercise especial prudence, caution and restraint in criminal proceedings, where the consequences of excessive judicial interference on an accused person's life and liberty may be severe indeed.

Background facts

The events leading to the Appellant's arrest

6 We begin our narrative by setting out the events leading to the Appellant's arrest. In doing so, we largely use the account given by the Appellant at the trial, which was generally consistent with the contents of the last four of his ten statements to the Central Narcotics Bureau ("CNB"). The Appellant admitted that the account reflected in his first six statements, in which he referred to the involvement of someone called "Danish", was essentially untrue, a point to which we will return below (at [83]–[88]).

7 At the material time, the Appellant lived with his wife, Mashitta binte Dawood ("Mashitta"), their children and their domestic helper ("the Helper") in their flat at Fernvale Link ("the Flat"). The Appellant's cousin, Sheikh Sufian bin Sheikh Zainal Abidin ("Sufian"), also stayed with them in the Flat. The Appellant and Mashitta occupied the master bedroom, the children and the Helper occupied one bedroom, while Sufian occupied another bedroom ("Bedroom 1").

8 The Appellant would smoke methamphetamine in the Flat daily. Sometimes he would do so alone, and several times a week, he would do so with other individuals in Bedroom 1. These individuals included Sufian and two of the Appellant's friends, Muhammad Faizal bin Mohd Shariff ("Faizal") and Mohammad Khairul bin Jabar ("Khairul"). Faizal, in particular, provided the Appellant with his supply of methamphetamine.

9 On 26 January 2016, at around 8.20pm, Faizal brought a trolley bag ("the trolley bag") to the Flat, and the Helper let him into the Flat. The Appellant claimed that unknown to him at the time, the trolley bag was placed in the storeroom of the Flat by the Helper.

10 A key issue that was raised in this case was whether the Appellant knew that Faizal would be bringing the trolley bag to the Flat on 26 January 2016, and that the trolley bag contained drugs. The Prosecution's case is that the Appellant knowingly received the trolley bag, which contained both the diamorphine and the cannabis, from Faizal. The diamorphine was found in Bedroom 1 after the Appellant's arrest, while the cannabis was found in the trolley bag (see [16]–[17] below).

11 The Appellant, however, testified that he did not know that Faizal would be bringing the trolley bag to the Flat on 26 January 2016. He claimed that he had been asleep from about 7.00pm until about 10.00pm on the night of 26 January 2016, and after he woke up, he left the Flat with Faizal at about 10.20pm. It was only on the next day, 27 January 2016, that he discovered the diamorphine and the trolley bag in the Flat. According to the Appellant, on 27 January 2016, at about 2.00pm, he noticed several packets of diamorphine laid out on the bed in Bedroom 1. He got into a quarrel with his wife, Mashitta, who was angry that the Appellant allowed people to come to the Flat to "do

‘drugs’” and “make use of [him]”. The Appellant then placed the packets of diamorphine into an “Akira” fan box (“the Akira box”) which was in Bedroom 1. He suspected that it was Sufian, the occupier of Bedroom 1, who had laid out the diamorphine on the bed.

12 Shortly thereafter, at about 4.00pm, the Appellant discovered the trolley bag in the storeroom. He was informed by Mashitta, who in turn had been told by the Helper, that Faizal had brought the trolley bag to the Flat. According to the Appellant, the diamorphine must have been taken out of the trolley bag as there had been no drugs in the Flat on the previous day, apart from some drugs in the master bedroom which were for his own consumption.

13 On the same afternoon, the Appellant called Sufian and Faizal and asked them to return to the Flat to “clear the stuff”. They both agreed to do so. The Appellant testified that he called Faizal “straightaway” upon discovering the trolley bag. While the Appellant initially suspected that the trolley bag might contain drugs, Faizal apparently informed him that it contained cigarettes instead, and the Appellant did not check whether this was true. He evidently trusted Faizal. He claimed that Faizal had previously left drugs of various types and in various quantities, as well as cigarettes, in the Flat. On those occasions, the Appellant would call Faizal to ask him to retrieve the relevant items and he would do so.

14 The Appellant’s iPhone call records were not referred to at the trial to identify the phone calls that he claimed he had made to Sufian and Faizal on the afternoon of 27 January 2016 after discovering the trolley bag and the diamorphine in the Flat. On appeal, we were referred to these call records, which corroborated the Appellant’s claim. These call records showed that on 27 January 2016, the Appellant called Sufian at 4.38pm (for 53 seconds),

5.10pm (for 34 seconds) and 5.20pm (for 61 seconds). The Appellant also called Faizal at 5.47pm (for 47 seconds). While the Appellant testified that he called Faizal “straightaway” after discovering the trolley bag at around 4.00pm, nothing turns on this slight discrepancy in timing, especially given that the Appellant was never referred to his call records either in the course of the investigations or at the trial.

The events following the Appellant’s arrest

15 On the night of 27 January 2016, at around 7.00pm, CNB officers began observing the Flat because of the Appellant’s suspected involvement in drug activities. At that time, the Appellant, Mashitta, their children, the Helper and Khairul were in the Flat. The Appellant was arrested at about 8.00pm as he was leaving the Flat.

16 The CNB officers proceeded to search the Flat in the Appellant’s presence, beginning with Bedroom 1. From Bedroom 1, Staff Sergeant Richard Chua Yong Choon (“SSgt Chua”), assisted by Sergeant Muhammad Farhan bin Sanusi (“Sgt Farhan”), seized the 64 packets of diamorphine that formed the subject matter of the first charge. Sixty-three packets were found in the Akira box, and the last packet was found in a “Mintek” bag (“the Mintek bag”) on the bed. The search of Bedroom 1 concluded at around 8.40pm.

17 Later, at around 9.45pm, Senior Staff Sergeant Ika Zahary bin Kasmari (“Senior SSgt Ika”) asked the Appellant a question. The precise terms of the question were disputed and will be discussed later. In response to the question, the Appellant answered “storeroom”. Senior SSgt Ika then escorted the Appellant to the storeroom, and SSgt Chua seized the trolley bag, which contained all the nine blocks of vegetable matter constituting the cannabis that

was the subject matter of the second charge. He also seized a black plastic bag containing 40 cartons of contraband cigarettes which, according to the Appellant, had been placed in the storeroom a few days earlier. There were other drugs and drug paraphernalia seized from the Flat which, unless referred to below, are not material to the present appeal.

The parties' respective cases at the trial

18 At the trial, the Prosecution only called the relevant CNB officers and those involved in the CNB's investigations as its witnesses. The Appellant gave evidence in his own defence but did not call any other witnesses. This meant that no evidence was led from Sufian, Faizal, Mashitta and the Helper. Plainly, they were material witnesses as they could have confirmed or, conversely, contradicted material aspects of the specific account of events given by the Appellant which we have set out above.

19 Significantly, statements were recorded from each of these four individuals. The defence counsel who represented the Appellant at the trial had requested the Prosecution to make available the statements taken from Sufian, Faizal and the Helper. However, this request was not acceded to. The learned deputy public prosecutor ("DPP"), Mr Lau Wing Yum, told us that the Prosecution took this position because it was of the view that these statements neither undermined its case nor strengthened the Defence's case, and therefore did not fall within its disclosure obligations as set out in *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 ("*Kadar*").

The Prosecution's case

20 At the trial, the Prosecution's case was, first, that in respect of both charges, it had proved that the Appellant had both possession and knowledge of

the nature of the drugs. The Prosecution then relied on the presumption of trafficking under s 17 of the MDA.

21 The Prosecution's alternative case was that in respect of both charges, it would rely on the presumption of possession under s 18(1) and the presumption of knowledge under s 18(2) of the MDA, and in all the circumstances, it could safely be inferred that the Appellant had possession of the drugs for the purpose of trafficking.

The Appellant's defence

22 For both charges, the Appellant generally disputed that he had possession of the drugs, and in particular, physical control of the drugs. He also disputed that he knew the nature of the drugs. The Appellant contended that the drugs were not his but Sufian's and/or Faizal's. In relation to the second charge of trafficking in the cannabis, the Appellant submitted that he thought that the trolley bag contained cigarettes. For both charges, the Appellant also disputed that he had possession of the drugs for the purpose of trafficking, on the basis that he had not brought the drugs to the Flat, and on discovering them there, had told Sufian and Faizal to remove them.

The decision below

23 The Judge found the Appellant guilty of both charges. In relation to the first charge, the Judge made the following findings. First, the Appellant had possession of the diamorphine since he had physical control of the Akira box and the Mintek bag, which together contained the 64 packets of diamorphine. Second, the Appellant, by his own evidence, knew at the material time that those 64 packets contained diamorphine. Third, the Appellant had not rebutted the presumption of trafficking under s 17 of the MDA. The Judge rejected the

Appellant's evidence that he had merely been holding the diamorphine pending its retrieval by Sufian and/or Faizal. The Judge reasoned that the Appellant's evidence as to the intended purpose of the diamorphine was "inextricably linked to his wider story" about how the drugs came to be present in the Flat without his knowledge. Rejecting his assertions, the Judge found that the Appellant knew that Faizal would be delivering the drugs to the Flat on 26 January 2016. The Judge also noted the large quantity of diamorphine in the Appellant's possession, more than four times the amount which mandated the imposition of capital punishment (see GD at [89]–[91]). Having rejected the Appellant's primary case as to how he came to be in possession of the diamorphine, the Judge had no difficulty finding that the Appellant had failed to rebut the presumption of trafficking.

24 On the Prosecution's alternative case, the Judge was satisfied that the Appellant had failed to rebut the presumptions of possession and knowledge under ss 18(1) and 18(2) respectively of the MDA. The Judge was also satisfied that the Prosecution had proved that the Appellant had possession of the diamorphine for the purpose of trafficking. The sheer quantity of the diamorphine, the Appellant's possession of four weighing scales seized from Bedroom 1 and the presence of the Appellant's DNA on the exterior surface of a group of ten mini packets of diamorphine (F1D3A) showed that he was involved in packing the diamorphine. Further, his attempts to distance himself from the drugs through the fabrication of elaborate accounts about Danish showed that he was determined to conceal his involvement (see GD at [92]–[94]).

25 Turning to the second charge, the Judge made the following findings. First, the Appellant had possession of the cannabis since he had physical control of the trolley bag in which the cannabis was contained. Second, the Appellant

knew at the material time that the trolley bag contained cannabis, and not cigarettes. Third, the Appellant had failed to rebut the presumption of trafficking under s 17 of the MDA, for similar reasons as those in relation to the first charge. In this regard, the Judge noted that the trolley bag contained more than twice the amount of cannabis which mandated the imposition of capital punishment (see GD at [89]–[91]). The Prosecution’s alternative case was also accepted, for essentially the same reasons as those given for the first charge.

26 In coming to her decision, the Judge rejected the Appellant’s submission that the Prosecution should have disclosed the statements recorded from Sufian, Faizal and Mashitta. She noted that under s 259(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) (“CPC”), statements made by any person (other than an accused person) in the course of any investigations into an offence were generally inadmissible, and pointed out that the Appellant had not attempted to show how the statements of Sufian, Faizal and Mashitta could be admitted pursuant to one of the exceptions set out in ss 259(1)(a) to 259(1)(e) of the CPC. Neither had the Appellant shown how these statements could be said to come within the ambit of the Prosecution’s disclosure obligations as set out in *Kadar* ([19] *supra*) (the “*Kadar* obligations”). The Judge also held that it was immaterial that the Prosecution had refused to produce the Helper’s statement as the Helper’s evidence would not have impacted her reasons for finding that the Appellant knew that Faizal would be bringing the trolley bag to the Flat on 26 January 2016 (see GD at [85]–[86]).

The parties' respective cases on appeal

The Appellant's case

27 As we mentioned at [3] above, the Appellant is appealing against his conviction and his sentence on both charges. We briefly set out his position on appeal.

28 In relation to the first charge, the Appellant no longer disputes that he had possession and also knowledge of the diamorphine (see [3] above). He contends, however, that he did not have the diamorphine, which did not belong to him, in his possession for the purpose of trafficking, but only for the purpose of returning it to Sufian and/or Faizal, who had left it at the Flat. This would not constitute trafficking, as we held recently in *Ramesh a/l Perumal v Public Prosecutor and another appeal* [2019] 1 SLR 1003 (“*Ramesh*”) at [110].

29 In relation to the second charge, the Appellant does not dispute that he had possession of the cannabis (see [3] above). However, he contends that he did not know that the trolley bag contained the cannabis. The Appellant claims that he was informed by Faizal that the trolley bag contained cigarettes, and he genuinely believed Faizal. The Appellant further submits that, in any event, he did not have the cannabis in his possession for the purpose of trafficking because the trolley bag was to be retrieved by Faizal, who had left it at the Flat.

30 In addition, the Appellant argues, in relation to both charges, that the Judge failed to appreciate in particular the significance of the non-availability of the statements of Sufian, Faizal and the Helper. Finally, while there is no allegation of bias, the Appellant contends that the Judge's conduct and her questioning of the witnesses at the trial amounted to excessive judicial interference and gave rise to the impression that her judgment had been clouded.

The Prosecution's case

31 In contrast, the Prosecution's position on appeal is that none of the Judge's findings were plainly wrong or against the weight of the evidence, and therefore, they should not be disturbed.

The issues to be determined

32 The issues that arise in this appeal are as follows.

33 First, we consider what, if anything, is the Prosecution's duty in relation to a material witness in the sense defined at [4] above.

34 Second, we analyse the charges before us. This requires us to consider:

(a) for the first charge concerning the diamorphine, whether the Appellant has rebutted the presumption of trafficking under s 17 of the MDA; and

(b) for the second charge concerning the cannabis, whether the Appellant has rebutted the presumption of knowledge under s 18(2) of the MDA, and if not, whether the Prosecution has proved that the Appellant possessed the cannabis for the purpose of trafficking.

35 Third, and finally, we consider whether the Appellant's complaint of excessive judicial interference is made out, and if so, what consequences ought to follow.

Issue 1: The Prosecution’s duty in relation to material witnesses

36 We begin with our decision on the question in respect of which we had directed the parties to tender further submissions at the end of the hearing of this appeal (see [4] above). We framed this question (“the Question”) as follows:

Where a witness has had a statement taken from him by the police or the CNB and where the defence can be expected to be confirmed or contradicted in material respects by such a witness, is there a duty on the Prosecution either to call such a witness or to make available to the Defence copies of any statement that has been taken from that witness or both?

37 In our judgment, this raises a broader question as to the proper ambit of the Prosecution’s role. It is helpful to begin with first principles. The Prosecution acts at all times in the public interest. In that light, it is generally unnecessary for the Prosecution to adopt a strictly adversarial position in criminal proceedings. As we stated in *Kadar* ([19] *supra*), “the Prosecution owes a duty to the court and to the wider public to ensure that only the guilty are convicted, and that all relevant material is placed before the court to assist it in its determination of the truth” [emphasis in original omitted] (at [200]). Pursuant to this duty, under the *Kadar* obligations (at [113]):

... [T]he Prosecution must disclose to the Defence material which takes the form of:

- (a) any unused material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused; and
- (b) any unused material that is likely to be inadmissible, but would provide a real (not fanciful) chance of pursuing a line of inquiry that leads to material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused.

This will not include material which is neutral or adverse to the accused – it only includes material that tends to undermine the Prosecution’s case or strengthen the Defence’s case. ...

38 In the subsequent analysis, we propose to address the Question in the following manner:

- (a) first, we consider whether the Prosecution has a duty to *disclose* a material witness’s statement to the Defence; and
- (b) second, we consider whether the Prosecution has a duty to *call* a material witness. The Prosecution’s evidential burden to rebut an accused person’s claim and the role of adverse inferences will also be discussed.

Issue 1(a): Whether the Prosecution has a duty to disclose a material witness’s statement to the Defence

39 Where the first of the two aforesaid sub-issues is concerned, both parties accept that the Prosecution ought to be under a duty to *disclose* a material witness’s statement to the Defence. We agree. For convenience, we will refer to this duty as the “additional disclosure obligations”.

40 We state at the outset that, as with the *Kadar* obligations, the additional disclosure obligations are laid down pursuant to s 6 of the CPC, which provides as follows:

Where no procedure is provided

6. As regards matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being in force, such procedure as the justice of the case may require, and which is not inconsistent with this Code or such other law, may be adopted.

As we stated in *Kadar*, the reference to what “the justice of the case may require” includes “procedures that uphold established notions of a fair trial in an adversarial setting where not already part of the written law” (at [105]).

41 We should point out two key differences between the *Kadar* obligations and the additional disclosure obligations:

(a) The first difference is that where the additional disclosure obligations are concerned, it does not matter whether the statement in question is: (a) favourable (and so triggers the *Kadar* obligations); (b) neutral; or (c) adverse to the accused person. If appropriate, and if there are valid reasons, the Prosecution can apply to the court for the redaction of those portions of the statement that have nothing to do with the accused person's defence, relevance to the defence being the factor that renders the statement a *material* statement in the first place.

(b) The second difference is that the additional disclosure obligations do not require the Prosecution to carry out a prior assessment of whether a material witness's statement is *prima facie* credible and relevant to the guilt or innocence of the accused person. Such an assessment is required for material that is disclosed pursuant to the Prosecution's *Kadar* obligations because we were concerned in *Kadar* to reasonably limit the amount of unused material that the Prosecution would have to disclose. This concern does not arise in relation to the statements of material witnesses because the number of such statements will in most cases be limited. The burden to disclose such statements would not be onerous on the Prosecution in most cases, and hence, there would be no need for the Prosecution to undertake any wide-ranging review or assessment of *prima facie* credibility and relevance before disclosing such statements.

42 For the avoidance of doubt, we should add that neither the *Kadar* obligations nor the additional disclosure obligations affect the operation of any ground for non-disclosure recognised by law.

The basis for the Prosecution’s additional disclosure obligations

43 We turn to the basis for finding a duty on the part of the Prosecution to disclose a material witness’s statement to the Defence.

44 First, the Prosecution candidly acknowledged that there might be instances where “[t]he Prosecution may not, despite acting in good faith, fully appreciate the defence the accused is running or intends to run”. In such circumstances, the Prosecution contemplated that it might “inadvertently” fail to disclose statements which might tend to support the defence. In our judgment, it would be an intolerable outcome if the court were deprived of relevant evidence that might potentially exculpate the accused person simply because the Prosecution made an error in its assessment of the significance of certain evidence. The fact that such an error is made in good faith does not change the analysis.

45 Second, as also accepted by the Prosecution, an accused person ought to have access to all relevant information in order to make an *informed choice* in deciding whether or not to call a material witness. Both parties in fact agree that while the Defence always has the right to call a material witness, it is at a *distinct disadvantage* in deciding whether or not to do so when it is not aware of what the witness has previously said in the course of the investigations into the offence alleged against the accused person (see *Harven a/l Segar v Public Prosecutor* [2017] 1 SLR 771 at [70]). Further, as the Appellant submitted, the practical difficulties of eliciting self-incriminating evidence from a material

witness might be insurmountable. For instance, in the present case, if the Appellant had called Faizal as a witness, the Appellant would have had to elicit from Faizal an admission that Faizal was involved in drug trafficking activities and intended to return to the Flat to retrieve the drugs, at a time when Faizal might have been involved in discussions with or making representations to the Prosecution in connection with his potentially being charged in relation to the drugs. In such circumstances, if the Appellant had been unsuccessful in eliciting an admission to this effect from Faizal, he might well have ended up having to apply to impeach Faizal, and yet, he would have had to do so without having Faizal's statements if those statements had not been disclosed by the Prosecution pursuant to its *Kadar* obligations. Any such attempt by the Appellant would likely have been doomed from the outset.

46 There is a further dimension to the disadvantage faced by the Defence in such circumstances. Suppose, in this case, the Defence had interviewed Faizal, and Faizal had confirmed the Appellant's defence that he had called Faizal on the afternoon of 27 January 2016 to ask Faizal to retrieve the drugs from the Flat, and Faizal had agreed to do so. It would ordinarily seem sensible and logical for the Appellant to then call Faizal as a defence witness to corroborate his defence. The Appellant might, however, have yet been faced with a real dilemma as to whether or not to do so. The Appellant would be aware that the Prosecution had access to whatever statements Faizal had previously made, and that those statements were thought by the Prosecution not to be subject to disclosure pursuant to its *Kadar* obligations. In considering the possible reasons why the Prosecution considered that Faizal's statements did not fall within the ambit of its *Kadar* obligations, the Appellant would have had to contemplate at least the following scenarios: (a) Faizal's statements were in fact adverse to him, contrary to what Faizal might have told him; (b) Faizal's statements were

neutral to both parties; or (c) possibly, as the Prosecution recognised in its submissions, the Prosecution had wrongly assessed that Faizal's statements did not undermine its case or strengthen the Defence's case. Thus, in deciding whether or not to call Faizal as a defence witness, the Appellant would have had to consider the risk that Faizal's statements might contradict his defence and likely end up being used to undermine his credibility as a witness, all of which might ultimately harm his case at the trial.

47 In our judgment, leaving an accused person in a situation where he chooses not to call a material witness because of the dangers arising from his not being aware of what that witness has previously said in his statements to the investigating authorities does not reflect a satisfactory balance between ensuring fairness to the accused person on the one hand, and preserving the adversarial nature of the trial process on the other. As we have noted, the duty on the Prosecution to disclose a limited amount of unused material to the Defence (of which the *Kadar* obligations are a part) is premised on the Prosecution's duty to the court and to the public to ensure that only the guilty are convicted, and that all relevant material is placed before the court to assist it in its determination of the truth (see [37] above). The court's fundamental objective in criminal trials is to arrive at a just outcome through a fair process. This is what our decision in this case seeks to advance.

48 Further, it bears emphasis that where there is any doubt over whether a particular statement is subject to disclosure, whether under the *Kadar* or the additional disclosure obligations, the Prosecution ought to err on the side of disclosure. This is because the consequences of non-disclosure could be severe. As we stated in *Kadar* ([19] *supra*) at [120]:

... [T]here is no reason why a failure by the Prosecution to discharge its duty of disclosure in a timely manner should not

cause a conviction to be overturned if such an irregularity can be considered to be a material irregularity that occasions a failure of justice, or, put in another way, renders the conviction unsafe ...

49 We turn to the remaining points where there was some disagreement between the parties. These relate to:

- (a) when the Prosecution should be required to disclose to the Defence the statement of a material witness; and
- (b) whether that statement would be subject to disclosure if the material witness is called as a prosecution witness.

50 In our judgment, the Prosecution ought to satisfy its additional disclosure obligations when it files and serves the Case for the Prosecution on the accused person (if the statutory disclosure procedure applies), or at the latest, before the trial begins (if the statutory disclosure procedure does not apply). These are the same timelines as those that apply in respect of the Prosecution's *Kadar* obligations (see *Kadar* at [113]). Like the *Kadar* obligations, the Prosecution's additional disclosure obligations constitute a continuing obligation which only ends when the proceedings against the accused person (including any appeal) have been completely disposed of. Thus, if the relevance of a particular material witness's evidence only becomes apparent *after* the accused person has testified at the trial, then that witness's statement should be disclosed to the Defence at that juncture. As for whether the Prosecution is required to disclose the statement of a material witness who is a prosecution witness, we leave this issue open for determination on a future occasion. The issue does not arise here as none of the material witnesses in the present case was a prosecution witness. We elaborate on each of these points in turn below.

The time of disclosure

51 While the Appellant contended that a material witness's statement should be disclosed to the Defence *before* the trial, the Prosecution submitted that the statement ought to be disclosed only *after* the accused person has testified for two principal reasons. First, the Prosecution suggested that if a material witness's statement were disclosed to the Defence at an earlier stage, the accused person might tailor his defence to bring it in line with that witness's account. Second, the Prosecution suggested that the accused person might seek to influence that witness into giving evidence favourable to the Defence's case, or otherwise retracting or neutralising his evidence.

52 With respect, we think that these concerns are overstated. This is because the triggering of the additional disclosure obligations is itself a response to a defence which the accused person has *already* alluded to in his statements to the investigating authorities. If the concern is that the accused person might further "tailor" his defence at the trial after having had sight of the relevant material witnesses' statements, it is open to the Prosecution to challenge that defence by, for instance, taking further statements from the relevant material witnesses and calling them as rebuttal witnesses to contradict any new contentions that the accused person might put forth. If the Prosecution fails to do so, it may well be that the accused person is simply speaking the truth, rather than tailoring his defence. It should be emphasised that there is no principle of law that the evidence of an accused person must be treated as inherently incredible or being of suspect value merely because it advances his defence and is, in that sense, self-serving. If the presumption of innocence means anything at all, it must mean that an accused person who testifies to exonerate himself may be telling the truth. The assessment of whether or not he is doing so must, in the final analysis, depend on the totality of the evidence. And it should not be

overlooked that courts are entirely capable of assessing the credibility of the claims made by witnesses, that being among the most basic aspects of fact-finding, which is a core judicial task.

53 In our judgment, requiring the Prosecution to disclose a material witness's statement to the Defence *before* the trial is also consistent with the twin rationales underlying the additional disclosure obligations which we have identified above and which the Prosecution accepts (see [44]–[45] above). Since one of the reasons for imposing the additional disclosure obligations is to address the Prosecution's difficulties in assessing whether a material witness's statement falls within its *Kadar* obligations, it follows that the respective timelines for disclosure should be aligned. Moreover, as we have stated above (at [45]–[47]), the disclosure of a material witness's statement is also meant to enable the Defence to make an informed choice in deciding whether or not to call the witness concerned in the specific circumstance where the Prosecution has chosen not to call that witness. We reiterate that an accused person should not be left in a position where he chooses not to call a material witness because of the possibility that that witness's statement may be adverse to him, when that may not in fact be the case. If a potential defence witness has provided a statement to the Prosecution that is inconsistent with what he has told the Defence, it is only fair for the Defence to have prior notice of this statement when deciding on the witnesses that it intends to call. In this connection, the Defence ought to be able to decide on the witnesses that it wishes to call *before* the trial and *before* the accused person has given evidence. This is contemplated by the statutory scheme for disclosure, which requires the Defence to list the names of its witnesses in the Case for the Defence (see ss 165 and 217 of the CPC). It is obvious that the decision on which witnesses to call is a crucial part of the Defence's preparation for trial and its assessment of the strength of its

case. The latter may be a relevant consideration in deciding whether the accused person himself should testify, or, even more fundamentally, whether he should contest the charge against him. For these reasons, we are satisfied that the risks and concerns identified by the Prosecution, even assuming their validity, would in any event be outweighed by the need to ensure that the Defence is able fairly to prepare for trial and assess the strength of its case.

Whether the statement of a material witness who is a prosecution witness is subject to disclosure

54 We next address the Prosecution’s submission that it should not be obliged to disclose a prosecution witness’s statement to the Defence, even if that witness is a material witness. As we mentioned at [50] above, this issue falls outside the scope of the Question because we are concerned here with a situation where none of the material witnesses in question was called by the Prosecution. We therefore leave open for another time, when the issue is squarely raised, the question whether the statement of a material witness who is a prosecution witness is subject to the additional disclosure obligations set out here. That said, if a prosecution witness has provided a statement that is *inconsistent* with his testimony at the trial, we see no reason why that statement ought not to be disclosed to the Defence as part of the Prosecution’s *Kadar* obligations. The Defence ought to have that statement for the purposes of cross-examination and impeachment of the witness’s credit if appropriate.

55 We also observe that the “Code of Practice for the Conduct of Criminal Proceedings by the Prosecution and Defence”, jointly issued by the Attorney-General’s Chambers and the Law Society of Singapore, states as follows at para 41:

Where a witness called by the Prosecution gives evidence on a material issue in substantial conflict with a prior statement

made by the witness to justify impeachment proceedings under the Evidence Act, the Prosecution should disclose the prior statement to the Defence Counsel, in accordance with the law.

56 With these observations, we leave this issue for detailed consideration on a future occasion.

Issue 1(b): Whether the Prosecution has a duty to call a material witness

57 We turn to the second part of the Question, which is whether the Prosecution has a duty to *call* a material witness (who, as we stated at [4] above, can be expected to confirm or, conversely, contradict an accused person's defence in material respects). Here, both parties agreed that the Prosecution has no *duty* (in the sense of a *legal* duty) to call any witness, including a material witness. The Appellant, however, suggested that the Prosecution does not have an unfettered discretion, and that it should call witnesses who are “necessary to the unfolding of the narrative”.

58 We agree with the broad proposition that the Prosecution has no *duty* to call particular individuals as witnesses. We have previously stated that “the Prosecution has a discretion whether or not to call a particular witness, provided that there is no ulterior motive and the witness, who is available to, but not called by, the Prosecution, is offered to the Defence” (see *Lim Young Sien v Public Prosecutor* [1994] 1 SLR(R) 920 (“*Lim Young Sien*”) at [35]). In this connection, we have also previously noted that “[t]here may be many legitimate reasons why the Prosecution may not wish to call a particular person as a witness, examples of which would be the lack of credibility of his evidence and/or the immateriality of his evidence (despite its apparent credibility)” (see *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 at [30]).

59 In this regard, it is helpful to briefly refer to the position in other common law jurisdictions.

60 The position in Malaysia is set out in the decision of the Federal Court of Malaysia in *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630 (see also *Ghasem Hozouri Hassan v Public Prosecutor* [2019] 6 MLJ 231 at [28]). There, the Federal Court stated as follows at [42]:

... It is well settled that in a criminal case, the prosecution, provided that there is no wrong motive, has a discretion as to what witnesses should be called by it ... However, *that prosecutorial discretion must be subject to the most basic limitation that it has to produce all the necessary evidence to prove the case against the accused beyond reasonable doubt ...* [emphasis added]

61 As for the English position, both parties referred us to the decision of the Privy Council in *Adel Muhammed El Dabbah v Attorney-General for Palestine* [1944] AC 156, where it was said at 168:

... [T]he prosecutor has a discretion as to what witnesses should be called for the prosecution, and the court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive. ...

62 We note further that in England and Wales, the Prosecution’s discretion is guided by the principles set out in the decision of the English Court of Appeal in *R v Russell-Jones* [1995] 3 All ER 239 (“*Russell-Jones*”) (see also *R v Dania (Jordan)* [2019] EWCA Crim 796 at [37]). We set out some of these principles below (see *Russell-Jones* at 244–245):

The principles which emerge from the authorities and from rules of practice appear to be as follows.

...

(2) The prosecution enjoy[s] a discretion whether to call, or tender, any witness it requires to attend, but the discretion is not unfettered.

(3) The first principle which limits this discretion is that it must be exercised in the interests of justice, so as to promote a fair trial ...

...

(4) The next principle is that the prosecution ought normally to call or offer to call all the witnesses who give direct evidence of the primary facts of the case, unless for good reason, in any instance, the prosecutor regards the witness's evidence as unworthy of belief. ...

...

(5) It is for the prosecution to decide which witnesses give direct evidence of the primary facts of the case. A prosecutor may reasonably take the view that what a particular witness has to say is at best marginal.

(6) The prosecutor is also ... the primary judge of whether or not a witness to the material events is incredible, or unworthy of belief. ...

(7) A prosecutor properly exercising his discretion will not therefore be obliged to proffer a witness merely in order to give the defence material with which to attack the credit of other witnesses on whom the Crown relies.

...

63 Finally, we turn to the Australian position, which requires the Prosecution to call *both* witnesses who are favourable *and* witnesses who are unfavourable to its case. The High Court of Australia summed up the position as follows in *Diehm and another v Director of Public Prosecutions (Nauru)* (2013) 303 ALR 42 at [63]:

It is well established that the prosecutor in a criminal trial conducted under the adversarial system of criminal justice must act “with fairness and detachment and always with the objectives of establishing the *whole* truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused’s trial is a fair one”. The objective of a fair trial requires the prosecutor to call all available witnesses unless there is some good reason not to do so. ***Mere apprehension that [the] testimony of a***

particular witness will be inconsistent with the testimony of other prosecution witnesses is not a good reason for not calling that witness. Nor is it a good reason that the witness is regarded as “in the camp of” the accused.
[emphasis in original in italics; emphasis added in bold italics]

64 We pause to note that the Australian position is to some extent shaped by s 38 of the Australian Evidence Act 1995 (Act No 2 of 1995) (Cth), which permits the Prosecution to cross-examine its own witness if the evidence given by the witness is “unfavourable” to it. In other words, it is not necessary to show that the witness has turned “hostile”, for example, by departing from an earlier statement given to the Prosecution (see *Bianca Shandell Santo v R* [2009] NSWCCA 269 at [26]–[27]).

65 In this regard, s 156 of our Evidence Act (Cap 97, 1997 Rev Ed) (“EA”) states that “[t]he court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party”. The Prosecution contended that leave may only be granted if the witness has been shown to be hostile. As against this, we note that in *Public Prosecutor v BAU* [2016] 5 SLR 146, Woo Bih Li J observed at [24] that:

... [T]he discretion of the court under ... s 156 is absolute and is independent of any question of hostility or adverseness. ... The court has a wide discretion although such a discretion must be exercised carefully, otherwise it will be used liberally to circumvent the general rule that a party may not cross-examine his own witness. ...

66 It is not necessary for the purposes of this appeal to arrive at a concluded view on the proper interpretation of s 156 of the EA. Nevertheless, given the general rule that a party may not cross-examine its own witness, in our judgment, the Australian position ought not to apply in our context. Nor do we think it necessary to set out detailed principles to guide the Prosecution in the exercise

of its discretion in calling witnesses, as is the English position. It is also unhelpful to state, as the Appellant suggested, that the Prosecution is required to call witnesses who are “necessary to the unfolding of the narrative” as this expression is vague and bears no legal meaning.

67 In our judgment, it suffices to highlight that the Prosecution has no *duty* to call a material witness. However, in appropriate circumstances, the failure to call a material witness might mean that the Prosecution has failed to discharge its evidential burden to rebut the defence advanced by an accused person. In addition, the court may in certain circumstances be entitled to draw an adverse inference pursuant to s 116, Illustration (g) of the EA that the evidence of a material witness who could have been but was not called by the Prosecution would have been unfavourable to the Prosecution. Our reasons are as follows.

The Prosecution’s evidential burden and the drawing of adverse inferences

68 The principles relating to the Prosecution’s burden of proof were the subject of our recent decision in *Public Prosecutor v GCK and another matter* [2020] SGCA 2 (“GCK”). There, we explained that embedded within the concept of proof beyond a reasonable doubt is the Prosecution’s *legal* burden to prove the charge against the accused person beyond a reasonable doubt and its *evidential* burden to adduce sufficient evidence to address facts that have been put in issue (see *GCK* at [130] and [132]). The latter burden might also rest on the Defence, depending on the nature of the defence and the fact in issue that is being raised (see *GCK* at [133]).

69 As regards the evidential burden, it is well established that this is a burden which can *shift* between the parties. This burden was explained in

Britestone Pte Ltd v Smith & Associates Far East, Ltd [2007] 4 SLR(R) 855 at [58] as follows:

... [The evidential burden] is more accurately designated the evidential burden to produce evidence since, whenever it operates, the failure to adduce some evidence, whether in propounding or rebutting, will mean a failure to engage the question of the existence of a particular fact or to keep this question alive. As such, this burden can and will shift.

70 In our judgment, the Question in the present case squarely engages the Prosecution’s evidential burden to adduce sufficient evidence to rebut a defence raised by the accused person that has properly come into issue. We are concerned here with the narrow situation where an accused person has advanced a *specific* defence which identifies *specific* material witnesses and the Prosecution, despite having had access to these witnesses, has chosen not to call them.

71 In this specific situation, it seems obvious to us that the Prosecution ought to call the material witnesses in question if it is necessary to do so in order to discharge its evidential burden. To be clear, the Prosecution would not need to call these witnesses if it is satisfied that it can rely on other evidence to discharge its evidential burden, such as, for example, close-circuit television (“CCTV”) records which directly contradict the accused person’s defence. Neither would there be any question of the Prosecution having to discharge its evidential burden by calling these witnesses if the accused person’s defence is patently and inherently incredible to begin with. Subject to these obvious limitations, the Prosecution runs a real risk that it will be found to have failed to discharge its evidential burden on material facts in issue if the Defence has adduced evidence that is not inherently incredible and the Prosecution fails to call the relevant material witnesses to rebut that evidence.

72 In addition, it is well established that the Prosecution’s failure to call a material witness may justify the court drawing an adverse inference against it. In *Public Prosecutor v Muhammad Farid bin Mohd Yusop* [2015] 3 SLR 16 (“*Muhammad Farid*”) at [45], we endorsed the following observations of the High Court in *Mohamed Abdullah s/o Abdul Razak v Public Prosecutor* [2000] 1 SLR(R) 922 (“*Mohamed Abdullah*”) at [41]:

... In criminal matters, it is well established that where the Prosecution fails to call a material and essential witness, the court has the discretion to draw an adverse presumption against it under s 116 illus (g) of the EA. In deciding whether it is appropriate to draw such an adverse presumption against the Prosecution, all the circumstances of the case will be considered, to see whether its failure to call that material witness left a gap in its case, or whether such failure constituted withholding of evidence from the court. ...

73 In the present context, where the Prosecution has had access to a material witness whose evidence would be directly relevant to discharging its evidential burden and is in possession of a statement from that witness, the failure to call that witness to refute the evidence led by the Defence on a fact in issue may more readily justify an inference being drawn against the Prosecution that that witness’s evidence, if led, would have been adverse to it on that fact in issue. However, at the risk of stating the obvious, we stress that the drawing of an adverse inference must, in the final analysis, depend on the circumstances of each case. That is to say, while the Prosecution is *always* required to discharge its evidential burden whenever a defence raised by the accused person has properly come into issue, it does not inevitably follow that an adverse inference will be drawn against the Prosecution for its failure to call a material witness to testify on that defence. Nonetheless, in the context of absent witnesses, we note that it may be useful to refer to the following principles which were set out in *Sudha Natrajan v The Bank of East Asia Ltd* [2017] 1 SLR 141 (“*Sudha Natrajan*”) at [20]:

... With specific regard to absent witnesses, [the] broad principles governing the drawing of an adverse inference ... may be summarised as follows:

(a) In certain circumstances the court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in the matter before it.

(b) If the court is willing to draw such inferences, these may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(c) There must, however, have been some evidence, even if weak, which was adduced by the party seeking to draw the inference, on the issue in question, before the court would be entitled to draw the desired inference: in other words, there must be a case to answer on that issue which is then strengthened by the drawing of the inference.

(d) If the reason for the witness's absence or silence can be explained to the satisfaction of the court, then no adverse inference may be drawn. If ... a reasonable and credible explanation is given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or annulled.

74 We should also mention the following principles which are applicable to the drawing of adverse inferences generally (see *Sudha Natrajan* at [21], [23] and [26]):

(a) first, an adverse inference ought not to be drawn where the failure to produce evidence is reasonably attributable to reasons other than the merits of the case;

(b) second, in drawing the relevant inference, the court must put its mind to the *manner* in which the evidence that is not produced is said to be unfavourable to the party who might reasonably have been expected to produce it; and

(c) third, applying the best evidence rule, an adverse inference should not be drawn unless it can be said that the evidence that is withheld is superior to the evidence already adduced.

75 Returning to the Question in the present case, we are satisfied that the Prosecution’s failure to call a material witness may result in the court finding that it has thereby failed to discharge its evidential burden in respect of a material fact in issue and/or may justify the court drawing an adverse inference if the Prosecution is unable to satisfy the court that it had good reason not to call that witness.

76 In this regard, it may not suffice for the Prosecution to justify its failure to call a material witness on the basis that that witness’s prospective evidence seemed to be “neutral” if, clearly, that witness would have been in a position to either *confirm* or, conversely, *contradict* the accused person’s defence *in material respects*. In the present case, given that the statements of the material witnesses concerned – namely, Sufian, Faizal, Mashitta and the Helper –were *not* disclosed to the Defence pursuant to the Prosecution’s *Kadar* obligations, and these witnesses were also *not* called by the Prosecution to discharge its evidential burden, the logical conclusion is that their statements must have been neutral in the sense that they did not speak on the matters put in issue by the Appellant.

77 This suggests, and indeed, leads to the inference that questions on material aspects of the Appellant’s defence were not posed to these material witnesses when their statements were being recorded. In this regard, two important aspects of the Appellant’s defence which emerged from his last four statements to the CNB (the account given by the Appellant in his first six statements being, as we noted at [6] above, essentially untrue) were that: (a) he

did not know that Faizal would be bringing the trolley bag to the Flat on 26 January 2016 and had been asleep when Faizal arrived at the Flat with the trolley bag; and (b) he only discovered the trolley bag and the diamorphine in the Flat the following afternoon. It would appear that Faizal might not have been asked questions relating to his purpose of bringing the trolley bag to the Flat on 26 January 2016 and whether he had handed the trolley bag to the Appellant or to the Helper. It would also appear that the Helper might not have been asked whether she was the one who had placed the trolley bag in the storeroom and what the Appellant had been doing when Faizal arrived at the Flat with the trolley bag. If that was indeed the case, then, with respect, regardless of whether Faizal's and the Helper's statements were recorded before or after the Appellant's last four statements to the CNB, we cannot see any justification for the Prosecution not having asked Faizal and the Helper these questions, which would have confirmed or, conversely, contradicted the two aforesaid aspects of the Appellant's defence in material ways. If the statements of Faizal and the Helper had been recorded *before* the Appellant's last four statements to the CNB, further statements could have been taken from them in relation to the questions outlined above had their initial statements been neutral to the Appellant. This would likewise be the position if the two aforesaid aspects of the Appellant's defence had only emerged *at the trial*, even though this might conceivably have necessitated an adjournment of the trial. After all, returning to first principles, the Prosecution is duty-bound to place before the court all relevant material to assist it in its determination of the truth. In our judgment, it would be quite unfair to expect the Defence, *in place of* the Prosecution, to pose to material witnesses questions which may confirm or, conversely, contradict the accused person's defence in material ways. The accused person might not have the ability or resources to mount a reasonably robust investigation to find out what evidence a material witness might give. Further, as a practical matter, it might be difficult

for the Defence to elicit evidence from a material witness if such evidence would necessarily incriminate the witness.

78 We turn to address some other submissions made by the Prosecution.

79 The Prosecution submitted that the court should not draw an adverse inference against it for failing to call a material witness where the witness has been offered to the Defence or where the Defence is able on its own to trace the witness to testify (citing *Lim Young Sien* ([58] *supra*) at [35] and *Yoganathan R v Public Prosecutor and another appeal* [1999] 3 SLR(R) 346 at [37] respectively). However, we are presently concerned with a situation where the accused person has made a specific claim and *the evidential burden falls on the Prosecution to rebut that claim*. That being the case, it is for the Prosecution to call a material witness whose evidence may rebut that claim; the mere fact that the witness has been offered to the Defence or that the Defence can on its own trace the witness to testify does not change the analysis in any way. In such circumstances, if the Prosecution fails to call the witness, it may simply be found to have failed to discharge its evidential burden. There may be no need for the court to go further and draw an adverse inference as to what the missing evidence might have revealed.

80 Finally, the Prosecution submitted that if we were to hold that it has a duty to disclose a material witness's statement to the Defence in circumstances where it has chosen not to call that witness, then the court should "impose a *stricter* duty on the Defence to call that witness" [emphasis in original]. This would mean that the court would more readily draw an adverse inference *against the Defence* if the Defence, having seen that witness's statement, fails to call that witness without providing a satisfactory explanation.

81 We do not accept this submission. We reiterate that the additional disclosure obligations seek (among other things) to *assist* the Defence in assessing whether or not to call a material witness by requiring the Prosecution to disclose that witness's statement, and *not thereby to compel the Defence to call* that witness as a defence witness. It is apposite to refer to the following observations of the High Court in *Mohamed Abdullah* ([72] *supra*), which we endorsed in *Muhammad Farid* ([72] *supra*) at [45], in relation to the drawing of adverse inferences against the Defence for failing to call a material witness:

41 ... In criminal matters, it is well established that where the Prosecution fails to call a material and essential witness, the court has the discretion to draw an adverse presumption against it under s 116 illus (g) of the EA. ... In contrast, due to the allocation of the burden of proof in criminal matters, *great caution should be exercised when applying s 116 illus (g) [of the] EA to the [D]efence's failure to call a material witness*. Whereas the Prosecution has the burden to prove its case beyond reasonable doubt, the defendant has no such burden to prove his innocence. Instead, all that he has to do, is to cast a reasonable doubt on the Prosecution's case. ...

42 Therefore, it is clear that *s 116 illus (g) of the EA does not apply with the same vigour to the Defence as to the Prosecution. Otherwise, it would be tantamount to placing a duty on the Defence to call every material witness*, and to prove the defendant's innocence. When faced with a situation where the Defence has failed to call a material witness, the court should bear in mind that such failure on the part of the Defence does not add anything to the Prosecution's case, in that it does not operate to raise any presumption which would help the Prosecution to prove its case beyond reasonable doubt when it has otherwise failed to do so. Instead, *the Defence's failure to call a material witness will only affect its own ability to cast a reasonable doubt on the Prosecution's case*. Section 116 illus (g) of the EA does not change this fundamental principle. In every case, the court will ask, in view of all the facts and evidence before it, whether the Defence has succeeded in casting a reasonable doubt on the Prosecution's case despite its failure to call a material witness.

...

44 Thus, when the Singapore court is faced with a situation where the Prosecution has made out a complete case against the defendant, or has adduced rebuttal evidence against the

Defence, and the case discloses that the Defence has failed to call a material witness, s 116 illus (g) of the EA merely allows the court, where appropriate, to draw the natural conclusion that the evidence which could have been adduced but was not would have been unfavourable to the defendant. If such a natural conclusion can indeed be drawn, then it would go towards the court's consideration of whether the Defence has cast a reasonable doubt on the Prosecution's case. However, in deciding whether it is appropriate to draw this conclusion, all the facts and circumstances of the case will be considered. ...

[emphasis added]

82 Aside from this, there is simply no basis at all for the submission that an adverse inference should be drawn against the Defence for failing to call a material witness when it is the Prosecution's evidential burden that is in issue. The Prosecution cannot seek to discharge that burden by relying on the Defence not calling particular evidence from a material witness to advance its case, regardless of whether or not the Defence has access to statements previously given by that witness to the investigating authorities.

Preamble to Issue 2: Inconsistencies in the Appellant's ten statements to the CNB

83 Before turning to the charges before us, we make a preliminary point concerning the inconsistencies in the Appellant's ten statements to the CNB, which we alluded to earlier (see [6] above). The contents of these statements were set out by the Judge at [25]–[34] of the GD. In brief terms, the Appellant's initial account in his first six statements was that it was Danish who had left "things" in the Flat in the early morning of 27 January 2016. The Appellant claimed that Danish then sent him a text message informing him that someone would come to collect the "things", but that did not happen despite the Appellant repeatedly calling Danish later that day. The Appellant claimed that he knew the "things" were drugs only after he was arrested. The Appellant's account of Danish was elaborate and included details as to how he had first met Danish as

well as how Danish would stay over at the Flat regularly almost every weekday since October 2015.

84 It is not disputed that the Appellant fabricated or at least embellished his account of Danish in the original version of the events that he gave in his first six statements. In his ninth statement, the Appellant admitted that Danish had never been to the Flat before, and that he had in fact never seen Danish before. At the trial, the Appellant testified that he had given this fictitious account of Danish in his defence to the two capital trafficking charges for a few reasons, including the following: he felt that he had to provide an answer to the charges; he was suffering from drug withdrawal symptoms; he was confused, in fear, in shock and not in the right state of mind; he knew that Danish was the ultimate supplier of the drugs; and he deliberately made up the story concerning Danish. Evidently, some of these reasons were conflicting.

85 The Judge found the Appellant to be “an untruthful and unreliable witness, who kept changing his story along the way”. She also concluded that he had made up stories about Danish in his first six statements “to hide the fact that he knew that Faizal had come to the Flat on 26 January 2016 with [the trolley bag]” and “to disassociate himself from the drugs” in the Flat (see GD at [82]). This seems to us to be a significant part of the Judge’s reasoning that led her to conclude that the Appellant was guilty of both trafficking charges.

86 It is useful to set out the basic principles concerning the corroborative effect of lies told by an accused person. In this regard, an accused person’s lies can only amount to corroboration of guilt under carefully prescribed conditions. One such condition is that the lies must relate to a *material issue* (see *Public Prosecutor v Ilechukwu Uchechukwu Chukwudi* [2015] SGCA 33 at [60]). Further, even where lies which can amount to corroboration of guilt are

established, they can only be employed to support *other evidence* adduced by the Prosecution and cannot by themselves make out the Prosecution's case (see *GCK* ([68] *supra*) at [141], citing *Public Prosecutor v Chee Cheong Hin Constance* [2006] 2 SLR(R) 24 at [92]).

87 In this regard, the Appellant submitted that his lie about the involvement of Danish in the events of 26 and 27 January 2016, when it was in fact Faizal who had been involved, was a lie as to the *identity* of the person who had brought the diamorphine and the cannabis to the Flat. The Appellant contended that this was not a *material issue*; rather, it was a *non-issue* because, first, the identity of that person was in no way relevant to the criminality that was inherent in the situation, and, second, there was, in any case, independent evidence, in particular, CCTV records, establishing that Faizal was the one who had brought the trolley bag (which contained the diamorphine and the cannabis) to the Flat. We agree. The fact of the matter is that the trolley bag was not already in the Flat prior to the events of 26 and 27 January 2016, and it was brought to the Flat by a third party on the night of 26 January 2016. This much cannot seriously be disputed. The substance of the Appellant's defence in all his ten statements to the CNB *remained* that when he discovered the trolley bag and the diamorphine in the Flat on the afternoon of 27 January 2016, he sought to return them to whoever had left them at the Flat, which, by the original account in his first six statements, was Danish (or someone acting on Danish's instructions and behalf). We are unable to see how, in lying that Danish, rather than Faizal, had been involved, the Appellant could be said to have disassociated himself from the drugs, as the Judge thought. In particular, we do not see how this lie could be said to be a lie that somehow corroborated his guilt in respect of the charges that he faced, even if it damaged his trustworthiness.

88 At the same time, it should be emphasised that this lie *does not necessarily mean that the Appellant lied about other matters as well*. This too would have to be considered in the round in the light of all the evidence.

89 In that light, we turn to the two charges before us.

Issue 2: The charges

90 In relation to the first charge, the sole issue, as we mentioned at [3] above, is whether the Appellant possessed the diamorphine for the purpose of trafficking. There is no dispute that the Appellant had possession and knowledge of the diamorphine. The Prosecution is entitled to rely on the presumption of trafficking under s 17 of the MDA, and we thus consider whether the Appellant has rebutted that presumption.

91 As for the second charge, there are two issues, it being common ground that the Appellant had possession of the cannabis (see [3] and [29] above). The first issue is whether the Appellant knew that the trolley bag contained the cannabis. In this regard, since the Prosecution has relied on the presumption of knowledge under s 18(2) of the MDA, we will have to consider whether the Appellant has rebutted that presumption. If the presumption of knowledge is not rebutted, it will then become necessary to consider the second issue, which is whether the Appellant possessed the cannabis for the purpose of trafficking.

92 In considering whether the Appellant has rebutted the relevant presumptions, we bear in mind the inherent difficulties of proving a negative, and therefore, that the burden on an accused person to rebut a presumption which operates against him should not be so onerous that it becomes virtually impossible to discharge (see *Gopu Jaya Raman v Public Prosecutor* [2018] 1 SLR 499 (“*Gopu Jaya Raman*”) at [2] and [24]).

Issue 2(a): The first charge of trafficking in the diamorphine

93 In concluding that the Appellant possessed the diamorphine for the purpose of trafficking, the Judge made the following findings (see GD at [94]):

- (a) First, the Judge rejected the Appellant’s evidence “that he had nothing to do with how the drugs came to be found in the Flat” and “that he intended to return the drugs to Faizal or Sufian”.
- (b) Second, the Appellant’s DNA was found on the exterior surface of F1D3A, a group of ten mini packets of diamorphine (see [24] above), which showed that he was involved in packing the diamorphine.
- (c) Third, the sheer quantity of the diamorphine made an inference of trafficking “irresistible”.
- (d) Fourth, it was not the Appellant’s case that the diamorphine was intended for his personal consumption.
- (e) Fifth, the Appellant did not deny that the four weighing scales seized from Bedroom 1 were in his possession and were used by him (although he claimed that he used them only to ascertain the weight of the methamphetamine that he obtained for his own consumption).
- (f) Sixth, the Appellant’s fabrication of elaborate accounts to distance himself from the drugs showed that he was concerned to conceal his involvement.

94 We develop our subsequent analysis in the following sequence:

- (a) We begin by considering whether the Appellant’s account of the events was inherently incredible. If it was not, it was incumbent on the

Prosecution to adduce sufficient evidence to discharge its evidential burden to rebut the Appellant's defence (see [68]–[71] above).

(b) In that regard, we then consider whether the Judge erred in: (i) rejecting the Appellant's evidence that he did not know about the trolley bag and the diamorphine until 27 January 2016, the day after Faizal brought these items to the Flat; and (ii) rejecting the Appellant's evidence that after discovering these items on the afternoon of 27 January 2016, he called Faizal and Sufian that same afternoon to ask them to return to the Flat to "clear the stuff", and they agreed to do so.

(c) Thereafter, we consider whether the presence of the Appellant's DNA on the exterior surface of F1D3A showed that he was involved in packing the diamorphine.

95 In our judgment, in the context of the particular facts that are before us, if we find that the Judge erred in these material respects, the Appellant would have rebutted the presumption of trafficking. The fact that there was a large quantity of diamorphine in the Appellant's possession would be beside the point, as would be the fact that he did not possess the diamorphine for his personal consumption. This is because the Appellant's case is that he never wanted to come into possession of the drugs, and once he found the drugs, he tried to return them to those whom he thought owned them. Further, although the Appellant admitted that he possessed the four weighing scales seized from Bedroom 1, he explained, in respect of the two weighing scales that he was questioned on, that he had only used them to measure the weight of the methamphetamine that he obtained for his own consumption. We note too that in the Appellant's first statement to the CNB, he had explained that the weighing scales were used by Sufian or Danish for packing drugs and that he was not involved in packing

drugs. So far as Sufian is concerned, this would not be an incredible assertion, given that he was the occupier of Bedroom 1. The Prosecution could have led evidence from Sufian to confirm or, conversely, contradict the Appellant's claim as to the use of the weighing scales, but it did not do so. Accordingly, if we accept the Appellant's account of the events, the fact that he possessed the four weighing scales seized from Bedroom 1 would not in itself be sufficient to displace the conclusion that he had rebutted the presumption of trafficking.

96 We turn to consider whether the Appellant's account of the events was inherently incredible, and if not, whether it shifted the evidential burden to the Prosecution.

The Appellant's account of the events

97 We first set out the key assertions made by the Appellant in claiming that he did not possess the diamorphine for the purpose of trafficking. In so doing, we also identify in parentheses the statements in which these assertions were first made.

- (a) The trolley bag was brought to the Flat by Faizal on the night of 26 January 2016 (seventh statement). This fact is no longer disputed and is confirmed by the CCTV records. The Appellant explained that it was "[n]ot possible" that the diamorphine could have been from somewhere other than the trolley bag as there were "no drugs" in the Flat the day before (tenth statement). It is similarly not disputed that the diamorphine was indeed initially contained in the trolley bag, although it was found in Bedroom 1 during the search of the Flat after the Appellant's arrest.

(b) The Appellant was asleep when Faizal brought the trolley bag to the Flat. The trolley bag was placed in the storeroom by the Helper while the Appellant was asleep (eighth statement).

(c) The Appellant did not know about the diamorphine until he saw it laid out on the bed in Bedroom 1 at around 2.00pm on 27 January 2016 (tenth statement). Similarly, the Appellant did not know about the trolley bag until he saw it in the storeroom on the afternoon of 27 January 2016. He did not open the trolley bag (tenth statement). While the Appellant initially said that he saw the trolley bag at around 2.00pm, he later clarified at the trial that he saw it at around 4.00pm. We do not think that anything turns on this slight discrepancy in timing given that the Appellant's statements were recorded months after the relevant events.

98 One material aspect of the Appellant's account of the events which did not emerge from his statements were the *phone calls* that he made to Faizal and Sufian upon discovering the trolley bag and the diamorphine in the Flat on the afternoon of 27 January 2016 and the *contents* of those phone calls. Nonetheless, it is not disputed that the Appellant *did* indeed call Faizal and Sufian that afternoon as this is evident from the call records (see [14] above). Given that Faizal and Sufian were not called by the Prosecution as witnesses, the only account of these phone calls came from the Appellant himself. In this regard, his evidence at the trial was as follows:

Q: ... Now, can you tell the Court what happened after you saw the drugs? You had a quarrel with your wife, okay, can you explain what happened after that?

A: I had a big quarrel with my wife, Your Honour. And after I quarrel with my wife, then Yan, is my cousin Sufian, he left the house. After he left the house, I did make a phone call to Faizal and to Sufian to come back and clear the stuff, Your Honour.

Q: *So you called both Sufian and Faizal and you asked both of them to clear the stuff.*

A: Yes, Your Honour.

Q: And when you called them, what did they say?

A: As for I call Faizal, Your Honour, he didn't say anything. *When I asked him to come and collect and clear this stuff, he only replied "Yes". As for Sufian, I call him to come back and he say yes, he will come back. That's all, Your Honour.*

[emphasis added]

99 In our judgment, this aspect of the Appellant's evidence at the trial could not be described as an afterthought. It should be emphasised that throughout *all* of his statements, the Appellant was consistent in maintaining that he did not possess either the trolley bag or the diamorphine for the purpose of trafficking. Based on the original account in the Appellant's first six statements, the person to whom these items were supposed to be returned was Danish; and based on the account in his last four statements, those persons were Sufian and/or Faizal. Seen in this light, the Appellant was therefore consistent in his defence that after he discovered the trolley bag and the diamorphine in the Flat, he sought to return these items to their actual owners rather than to distribute the drugs in the trolley bag onwards to third parties.

100 Significantly, the Appellant's claim that he was seeking to return the trolley bag and the diamorphine to their actual owners was also *not inconsistent* with his past interactions with Faizal in particular. The Appellant elaborated as follows in his ninth statement:

Q24: Has Faizal left any drug items at your house before, apart from the Ice he gives you for free?

A24: Yes.

40. He has left "Heroin", "cannabis", "ecstasy" and "erimin" at my house before. It is difficult to say the quantity because

the drugs he left in my place is usually in a “sling bag”, “bag”, “paper bag” or “plastic bag”, and I did not take out and see. I know that it is “Heroin”, “cannabis”, “ecstasy” or “erimin” because *when I called him and ask him, he said he will come back for the things*. Sometimes when he leaves my house, it is late at night and I have a feeling that he does not want to be caught with the “drugs” along the way. *When I notice that he left the things in my house, I will call him to come back and take*. Regardless of whether it is late at night or not, I will call him by phone and ask him to come back and take. However, sometimes I do not notice the things he left behind. Sometimes, [Sufian] who sleeps in the middle room, will tell me that there are things in the room. He will ask me “whose bag is this” when he arrives home, after Faizal has left. *When this happens, I will call Faizal and ask him to come and take his things but sometimes, Faizal will only come to take the next day*.

[emphasis added]

101 Given this account of the Appellant’s previous interactions with Faizal and the fact that the Appellant had informed the CNB that Faizal was the individual who had brought the trolley bag to the Flat, it is unclear why the Appellant was never asked, when his statements were being recorded, whether he had called Faizal to ask him to remove the trolley bag and the diamorphine from the Flat *on this particular occasion*. Had the Appellant been asked that question, it is possible that his claim that he had called Faizal and Sufian to ask them to remove the trolley bag and the diamorphine from the Flat and they had agreed would not have been made for the first time only at the trial.

102 In addition, had the records of the Appellant’s phone calls to Faizal and Sufian on the afternoon of 27 January 2016 been referred to the Appellant in the course of the investigations, he might then have been able to provide his account as to the *contents* of these phone calls at an earlier stage.

103 In these circumstances, we are satisfied that the Appellant’s defence had been properly put in issue. There was nothing inherently incredible about the Appellant’s account of the events, and the evidential burden therefore shifted to

the Prosecution to rebut the Appellant's defence (see [68]–[71] above). We proceed to consider whether, in the light of the Prosecution's failure to call any evidence from the relevant material witnesses, this conclusion is affected either by the Judge's analysis or by the Prosecution's submissions.

Whether the Appellant knew that Faizal would be bringing the trolley bag to the Flat on 26 January 2016

104 The Appellant made two key assertions in his defence, both of which the Judge rejected. The first was that he did not know that Faizal would be bringing the trolley bag (which contained both the diamorphine and the cannabis) to the Flat on 26 January 2016, and only discovered the trolley bag and the diamorphine in the Flat the following day. If, contrary to this assertion, the Appellant had in fact known that Faizal would be bringing the trolley bag to the Flat on 26 January 2016, that would destroy his claim that he did not even know of the presence of the trolley bag and the diamorphine in the Flat until the following day, as well as his second key assertion, which was that on discovering these items, he tried to have them returned to their actual owners. Further, if these two key assertions by the Appellant were properly rejected, it would point to the conclusion that, contrary to the Appellant's defence, there was a pre-existing arrangement for the drugs to be handed to him, and since it was not his case that the drugs were for his personal consumption, he must have possessed them for the purpose of trafficking. We consider below the evidence relating to the first of these key assertions.

(1) The Prosecution's failure to call the relevant material witnesses

105 We begin with the Prosecution's failure to call the relevant material witnesses – namely, Faizal, Sufian and the Helper – to challenge the Appellant's first key assertion. The relevance of their evidence was as follows:

(a) Faizal could have explained why he had brought the trolley bag to the Flat on 26 January 2016, whether he had handed the trolley bag to the Appellant or to the Helper, and whether the Appellant had known that he would be bringing the trolley bag to the Flat on that day.

(b) Sufian could have confirmed whether he had used the Appellant's iPhone on the night of 26 January 2016. This was significant because while the Prosecution adduced records of the phone calls made from and received on the Appellant's iPhone to refute the Appellant's claim that he had been asleep when Faizal brought the trolley bag to the Flat that night, the Appellant provided the explanation that his iPhone had been in Bedroom 1 at the time and Sufian could have been using his iPhone.

(c) The Helper could have confirmed whether she had received the trolley bag from Faizal and placed it in the storeroom, and what the Appellant and Sufian had been doing when Faizal arrived at the Flat with the trolley bag.

106 The Judge was unmoved by the Prosecution's failure to adduce any of this evidence because she rejected the Appellant's evidence that he did not know that Faizal would be bringing the trolley bag to the Flat on 26 January 2016 and only discovered the trolley bag and the diamorphine in the Flat on 27 January 2016. In this regard, the Judge relied on: (a) what she thought was an admission by the Appellant in his ninth statement, read in the light of his explanation during cross-examination of what he had said in that statement, that he knew that Faizal would be bringing the trolley bag to the Flat on 26 January 2016; and (b) the phone calls made from and received on the Appellant's iPhone while he was supposedly asleep on the night of 26 January 2016 when Faizal arrived at

the Flat with the trolley bag. For reasons which we will shortly develop, we do not regard the Appellant's ninth statement as an admission. We are also satisfied that there was a reasonable explanation for the phone calls made from and received on the Appellant's iPhone while he was supposedly asleep.

107 It follows that, in our judgment, the Appellant's account of the events should not have been rejected without more, and it was therefore incumbent on the Prosecution to have called Faizal, Sufian and/or the Helper to discharge its evidential burden. The Prosecution could have relied on these witnesses' evidence to *directly challenge* the Appellant's account of the events. The Prosecution's failure to call any evidence from these witnesses left its evidential burden undischarged. Significantly, the Prosecution had access to and did record statements from these witnesses which were not disclosed to the Defence. In the circumstances, and absent any other explanation, it seems reasonable to infer that these witnesses' evidence, if adduced, would have been unfavourable to the Prosecution (see [72]–[77] above). We now elaborate on our analysis and reasons.

(2) The Appellant's ninth statement

108 Where the Appellant's ninth statement is concerned, if this statement did indeed amount to an admission by the Appellant that he knew that Faizal would be bringing the trolley bag to the Flat on 26 January 2016, we would have been prepared to accept that the Prosecution was entitled not to call any witnesses to rebut the first key assertion that the Appellant made in his defence. However, for the reasons that follow, we do not accept that the Appellant's ninth statement amounted to an admission.

109 We begin by setting out the relevant extracts from the Appellant’s ninth statement:

Q25. When Faizal came to your house in the evening of 26/01/16, was he there to collect things?

A25. He came to put things.

Q26. *Were you aware that he came to put things?*

A26. Yes.

Q27. Were you aware that the things are drugs?

A27. No.

Q28. *What were the things he put?*

A28. *The trolley bag.*

Q29. Did you ask him what was in the trolley bag?

A29. Yes. He said cigarettes.

42. When Faizal came to put the bag, I was sleeping. I later woke up and took the lift down together with Faizal. Then we parted ways. I only realised that there were “drugs” inside the “trolley bag” after I was arrested. ...

[emphasis added]

110 The Appellant’s ninth statement must be read in context. In his seventh statement, the Appellant had told the CNB officers that Faizal had brought the trolley bag to the Flat and that they could check the CCTV records to verify this. At the trial, the Appellant clarified that it was in fact his wife who had told him this piece of information, based on what the Helper had told her. It was this information that then prompted the Appellant to call Faizal on the afternoon of 27 January 2016 to ask him to remove the trolley bag from the Flat. Consistent with this, the Appellant said as follows in his eighth and tenth statements:

[Eighth statement] ... It was Faizal who bring up the trolley bag and I have been told by my maid. I didn’t check the bag as my maid put the bag straight into the store. By bag, I mean the trolley bag that Faizal brought.

[Tenth statement] ... [O]n 26/01/16, I do not know if [Faizal] brought “drugs” to my house because I was asleep.

111 In his evidence-in-chief, the Appellant explained his answers in his ninth statement as follows:

Q ... Question 28:

[Reads] “What were the things he put?”

Answer 28:

[Reads] “The trolley bag.”

Okay? Now you had said that when he came up, you were asleep and that he did not tell you about the trolley bag. So can you explain this answer?

A *Your Honour, this statement was take[n] after I’ve seen the evidence that the IO [investigation officer] brought that Faizal was the one who brought up the bag. So when this statement was recorded, when the IO asked me, “What were the things he put”, and that’s the reason why I said it was the trolley bag, Your Honour.*

Q Okay. Question 29:

[Reads] “Did you ask him what was in the trolley bag?”

Answer 29:

[Reads] “Yes. He said cigarettes.”

Can you explain this as well since you had informed the Court that he did not tell you about the trolley bag?

A Is then – was after the arrest, Your Honour. Sorry, after I fight – fight with my wife and then I did make a call to him, Your Honour.

[emphasis added]

112 Later, during the Appellant’s cross-examination, the learned DPP read to the Appellant the extract of his ninth statement which we reproduced at [109] above. The learned DPP then cross-examined the Appellant as follows:

Q ... So, okay, remember you informed the Court that, well, **earlier Faizal had told you he’ll bring cigarettes in a trolley bag. Do you remember?**

A No, Your Honour.

Q Only just now before lunch, ***do you recall telling the Court, yes, where you agree with your statement that on that day – that evening, Faizal have [sic] to bring a trolley bag to your house*** or are you going to change your testimony?

A I know that he came to bring my Ice, Your Honour.

Q Yes. So our follow-up question was – you may say that he came to deliver Ice to you, but the point is that in your statement is very clear which I can refer to you, yes, was that Faizal came on the evening on 26th of January and to put things in your house and that thing is what he told you was cigarettes. ...

...

Q So, now ***do you maintain your testimony which you said during lunch just now*** or do you want to change your testimony now?

A *This is when after I called him on the 27th*, Your Honour.

...

Q Yes. Yes, and *you also know that day, he was bringing the trolley bag?*

A *Again, mm-hm.*

Q *You knew on that day, yes, he was bringing the trolley bag, right?*

A *Yah.*

Q Yes?

A On that day itself?

Q Yes.

A *Mm, mm.*

[emphasis added in italics and bold italics]

113 The Judge relied on the Appellant’s ninth statement, read in the light of his explanation during cross-examination of what he had said in that statement, to find that he had admitted that he was “aware in advance” on 26 January 2016

that “Faizal was going to the Flat with the trolley bag and to deliver drugs” (see GD at [53]).

114 We are unable to agree with this and have two principal difficulties with this portion of the cross-examination. First, contrary to what the learned DPP suggested in the questions which we emphasised in bold italics at [112] above, the Appellant had *not* earlier told the court that what he meant in his ninth statement was that he was “aware in advance” that Faizal would be bringing the trolley bag to the Flat on 26 January 2016. In fact, this had been clarified in the extract from the Appellant’s evidence-in-chief reproduced at [111] above. The learned DPP was mistaken in suggesting otherwise. This undermined any reliance being placed on the Appellant’s ninth statement, read with the extract from his cross-examination set out at [112] above, as a supposed admission by the Appellant that he knew that Faizal would be bringing the trolley bag to the Flat on 26 January 2016. Second, the learned DPP, in his line of questioning directed at the Appellant’s supposed knowledge of this, did not clearly frame his questions by reference to any specific time when the Appellant had such knowledge. This was a point of critical importance given what the Appellant had said in his seventh, eighth and tenth statements, as well as in his evidence-in-chief. In the circumstances, we are unable to accept that the Appellant’s ninth statement, read in the light of his explanation during cross-examination of what he had said in that statement, amounted to an admission that he knew that Faizal would be bringing the trolley bag to the Flat on 26 January 2016, given that he had consistently maintained in his eighth and tenth statements and in his evidence-in-chief that he had no such knowledge and only learnt the next day (that is, on 27 January 2016) that Faizal had brought the trolley bag to the Flat.

- (3) The phone calls made from and received on the Appellant's iPhone on the night of 26 January 2016

115 We next address the phone calls made from and received on the Appellant's iPhone while he was supposedly asleep on the night of 26 January 2016 when Faizal arrived at the Flat with the trolley bag at about 8.20pm. To challenge the Appellant's account that he was asleep at that time, the Prosecution led evidence that calls were made from and received on the Appellant's iPhone between 7.51pm and 10.05pm on 26 January 2016. The Appellant's response was that he did not answer or make those calls, and that his iPhone had been in Bedroom 1 then, so Sufian *could* have been the one who answered or made those calls.

116 The Appellant's specific identification of Sufian as the person who most likely used his iPhone at the material time on the night of 26 January 2016 could not be dismissed as mere speculation. The Appellant was not asked by the CNB, when his statements were being recorded, to explain the phone calls made to and from his iPhone that night, even though he had said in his eighth, ninth and tenth statements that he had been asleep at the material time on that night (see [109]–[110] above). It was only at the trial, more than two and a half years later, that the Prosecution first questioned him on this issue. In these circumstances, as the Appellant's counsel, Mr Andre Darius Jumabhoy, submitted, it was not surprising that the Appellant would have speculated as to who else could have used his iPhone at the material time since he was in no position to investigate the point himself.

117 It is obvious that the fact that phone calls were made from and received on the Appellant's iPhone on the night of 26 January 2016 does not actually show *who* made or received those calls. The Prosecution could easily have

called Sufian to rebut this aspect of the Appellant's defence, but it chose not to do so. It could also have called Faizal and/or the Helper to give their respective accounts to refute the Appellant's claim that he had been asleep when Faizal arrived at the Flat with the trolley bag, the materiality of which it would have been aware of, but it likewise chose not to do so. In these circumstances, we have no basis for rejecting the Appellant's explanation as to the use of his iPhone at the material time on the night of 26 January 2016, nor for rejecting, on this basis, his claim that he had been asleep at the time and was therefore unaware that Faizal had brought the trolley bag to the Flat until he learnt of this the next day at around 4.00pm.

118 It follows that, in our judgment, the Judge was wrong to reject the Appellant's account of how the trolley bag and its contents came to be in the Flat without his knowledge, and the failure of the Prosecution to address this left an evidential gap in its case against the Appellant.

Whether the Appellant called Sufian and Faizal to ask them to remove the trolley bag and the diamorphine from the Flat

119 We turn to the second key aspect of the Appellant's defence, namely, that when he discovered the trolley bag and the diamorphine in the Flat on the afternoon of 27 January 2016, he called Sufian and Faizal asking them to return to the Flat to remove these items, and they agreed. Again, the Prosecution failed to call any evidence to refute this claim. The Judge was unmoved by this, essentially because she thought that the "objective evidence", namely, the DNA evidence, rendered the Appellant's claim incredible (see GD at [95]). We turn to consider this.

- (1) The Prosecution's failure to challenge the Appellant's assertion and call the relevant witnesses

120 For this aspect of the Appellant's defence, the relevant witnesses were Sufian and Faizal, who could have given evidence as to the *contents of the phone calls* that the Appellant made to them on the afternoon of 27 January 2016. In short, Sufian and Faizal could have rebutted the Appellant's claim that he called them that afternoon to ask them to remove the trolley bag and the diamorphine from the Flat, and they agreed. Even though this aspect of the Appellant's defence was raised for the first time only in his evidence-in-chief, the Prosecution could have called Sufian and Faizal as rebuttal witnesses pursuant to s 230(1)(t) of the CPC, but it failed to do so. Our analysis at [107] above on the Prosecution's evidential burden and the drawing of an adverse inference applies equally to this point.

121 This, however, was not the only difficulty we had with this issue. It seems to us that the contents of the phone calls made by the Appellant to Sufian and Faizal on the afternoon of 27 January 2016 were barely explored at the trial, notwithstanding the objective call records which showed that these calls were made. These phone calls ought to have been examined to at least the same extent as the phone calls made from and received on the Appellant's iPhone on the night of 26 January 2016 while the Appellant was supposedly asleep (see [115] above). However, the Appellant was never challenged, in clear and express terms, that *he did not in fact call Sufian and Faizal to ask them to remove the trolley bag and the diamorphine from the Flat, nor did they agree to do so*. Instead, the Appellant was only challenged by the learned DPP in the following general terms, and only in respect of *Faizal*:

Q: Yes. So the point is – alright, at 2.00pm, you know there's this huge amount of heroin, right?

- A: Yes, Your Honour.
- Q: At 4.00pm, you discovered something in the trolley bag, which you did not check, but you know it's drugs. So you have –
- Ct: Sorry, but you suspect it's drugs.
- ...
- Q: Yes. And yet you just left the drugs there and waited for Faizal to come, is that your evidence?
- A: Yes, Your Honour, I – I waited for him to come till 8.00pm.
- Q: Yes. So are you saying that if let[']s say Faizal were to come at 12 midnight, you'll wait for him until 12 midnight?
- A: At that point of time I – I will – I think I will wait till 12 midnight, Your Honour.
- Q: Or if he comes the next day, you wait until the next day?
- A: Usually he won't come to that – around that period of time.
- Q: *No, so the point is that I put it to you that those drugs that were actually meant for you, you knew these were drugs and actually you knew these were meant for you.*
- A: I disagree, Your Honour.
- [emphasis added]

122 In these circumstances, on the evidence before us, there is simply *no contrary account* of the *contents* of the phone calls apart from that of the Appellant. His account would also not be inconsistent with his evidence as to his past interactions with Faizal (see [100] above).

123 Mr Jumabhoy, in fairness, suggested that the significance of the Appellant's defence, namely, that he was holding the trolley bag and the diamorphine intending only to return them to their owners, might not have been in the minds of the parties and the Judge at the trial, given that our judgment in *Ramesh* ([28] *supra*) was delivered around three months after the Judge had

convicted and sentenced the Appellant on the two trafficking charges. This, Mr Jumabhoy suggested, might explain why the Prosecution did not challenge the Appellant's evidence as to the purpose of his phone calls to Sufian and Faizal on the afternoon of 27 January 2016. As to this, we have two observations. First, by the same token, the Appellant and his counsel too would not have appreciated the legal significance of the point, and this lends credence to the Appellant's account of the events. But, second, if the overall narrative were accepted that the drugs were brought to the Flat by others, and that on discovering their presence, the Appellant called those whom he suspected were responsible to remove them, we fail to see how this could possibly have been thought *not* to be relevant.

(2) The DNA evidence

124 We next consider the DNA evidence and whether that pointed to the Appellant being involved in the *packing* of the diamorphine. If so, it would indicate that, contrary to what the Appellant claimed, he did not possess the diamorphine solely for the purpose of returning it to Sufian and/or Faizal. We first briefly describe the 64 packets of diamorphine which formed the subject matter of the first charge:

- (a) Sixty-three packets of diamorphine were found in the Akira box (F1).
 - (i) The Akira box contained three large packets of diamorphine (F1A, F1B and F1C).
 - (ii) The Akira box also contained two plastic bags (F1D and F1E).

(A) Each plastic bag contained three medium-sized Ziploc bags (F1D1, F1D2 and F1D3, and F1E1, F1E2 and F1E3 respectively).

(B) In turn, the six medium-sized Ziploc bags each contained a group of ten mini packets of diamorphine (F1D1A, F1D2A, F1D3A, F1E1A, F1E2A and F1E3A). There were thus a total of 60 mini packets of diamorphine. F1D3A consisted of a *group* of ten mini packets of diamorphine.

(b) The remaining packet of diamorphine (G1A1) was contained in a plastic bag (G1A) in the Mintek bag (G1).

125 Of the 64 packets of diamorphine, the Appellant’s DNA was found only on the exterior surface of F1D3A, which, we reiterate, was a *group* of ten mini packets of diamorphine. This leads to a particular ambiguity concerning the probative value of the DNA evidence which we address below. The Judge relied significantly on the presence of the Appellant’s DNA on the exterior surface of F1D3A to find that he was involved in *packing* the diamorphine and, therefore, involved in trafficking. The Judge reasoned that there were multiple layers of external packaging before one could come into contact with F1D3A, and it was thus “very unlikely” that the Appellant’s DNA could have been found on the exterior surface of F1D3A by “accidental touching” (see GD at [73] and [94]).

126 We respectfully disagree with the Judge’s finding. In our judgment, the DNA evidence adduced at the trial was insufficient to show that the Appellant was involved in packing the diamorphine.

127 We state at the outset that although the Appellant’s DNA was found on the exterior surface of F1D3A, it is unclear from the evidence before us whether his DNA was found on the exterior surfaces of *all* the ten mini packets of diamorphine that made up F1D3A. This is because the swabs from F1D3A that were sent to the Health Sciences Authority (“the HSA”) for analysis were not swabs of the *individual* mini packets. Rather, as Mr Jumabhoy pointed out to us, ASP Peh Zhen Hao (“ASP Peh”) testified that the ten mini packets constituting F1D3A were swabbed “collectively”. In the circumstances, it is unsafe to conclude that the Appellant’s DNA was found on the exterior surfaces of *all* the ten mini packets. It is equally possible that the Appellant’s DNA was found only on the exterior surface of *one* of the ten mini packets. It is unclear to us whether the Judge appreciated this distinction in her analysis of the DNA evidence.

128 This point is a significant one when we consider whether there were *reasonable explanations* for the presence of the Appellant’s DNA on the exterior surface of F1D3A, apart from his having been involved in the packing of the diamorphine. We accept that the *absence* of the Appellant’s DNA on the exterior surfaces of the other packets of diamorphine does not conclusively prove that he was not involved in packing them (see *Gopu Jaya Raman* ([92] *supra*) at [82]). Nevertheless, this has to be considered as a whole in the context of the coherence of the case advanced by the Appellant. Here, the fact that there were no widespread traces of the Appellant’s DNA on the exterior surfaces of the 64 packets of diamorphine weakens the inference that the Prosecution sought to draw, namely, that the Appellant was involved in packing the diamorphine. Further, the presence of the Appellant’s DNA in an isolated area also increases the likelihood that there were other reasonable explanations for

this, apart from his involvement in the packing of the diamorphine. In our judgment, there were at least two other reasonable explanations.

129 The first was an explanation which was implicit in the account of the events given by the Appellant. In short, the Appellant testified that he saw the six medium-sized Ziploc bags laid out on the bed in Bedroom 1 at around 2.00pm on 27 January 2016 (see [11] above). As we have mentioned, F1D3A consisted of a group of ten mini packets of diamorphine which were contained in one of these Ziploc bags, F1D3. There was a single layer, not multiple layers, separating F1D3 and F1D3A. According to the Appellant, he got into a quarrel with his wife shortly after he saw the six medium-sized Ziploc bags. He then placed all six Ziploc bags, among other items, into the Akira box (see [11] above). It does not seem to us that any attention was directed to whether the Appellant's DNA could have come into contact with the *contents* of F1D3 then, for instance, if F1D3 was not entirely closed, especially given that the ten mini packets of diamorphine constituting F1D3A were packed tightly together in F1D3. It was incumbent on the Prosecution to prove that the presence of the Appellant's DNA on the exterior surface of F1D3A was consistent *only* with his having packed its contents, and not because he had handled the packets of diamorphine when he placed them into the Akira box. Yet, beyond simply putting it to the Appellant in a formalistic way that he must have packed the diamorphine because his DNA was found on the exterior surface of F1D3A, the Prosecution did not explore any of these points in any meaningful way when cross-examining the Appellant.

130 There was another even more plausible explanation as to why the Appellant's DNA was found on the exterior surface of F1D3A, which first requires an understanding of how the diamorphine was handled in the Flat by Sgt Farhan and SSgt Chua:

(a) Before us, the learned DPP, Mr Lau, explained that typically, during a search and seizure operation, the CNB officers would unpack the drugs found into their separate components to label and itemise the exhibits. This would be done at the location where the drugs were seized. Indeed, Sgt Farhan confirmed this “normal practice” under cross-examination, although he could not specifically remember if it was adhered to in the present case. Nonetheless, Mr Lau rightly acknowledged that there was nothing to indicate that the normal practice was not observed in this case.

(b) Thus, from the Akira box, the three large packets of diamorphine and the two plastic bags would have been taken out. From the two plastic bags, the six medium-sized Ziploc bags would have been taken out, and then *so too would the 60 mini packets of diamorphine contained in the Ziploc bags have been taken out.*

(c) Throughout this process, both Sgt Farhan and SSgt Chua would have been wearing gloves. However, Sgt Farhan’s DNA was found on the exterior surface of F1E3. When questioned, Sgt Farhan explained that there was a “probability” that his saliva had come into contact with the exterior surface of F1E3 as he could not recall whether he had been wearing a mask at the time. Sgt Farhan’s DNA must have come into contact with the exterior surface of F1E3 *while he was at the Flat* as the drugs were subsequently sealed in separate tamper-proof bags and handed over to other CNB officers.

131 By parity of reasoning, it seems equally possible that the Appellant’s DNA might have been accidentally deposited on the *exterior* surface of F1D3A *while the CNB officers were in the Flat and in their presence*, particularly after

the contents of the various bundles were all unpacked. After all, the diamorphine was unpacked in the Flat, and traces of the Appellant's DNA could well have come into contact with the exterior surface of F1D3A innocently. For example, the very same explanation provided by SSgt Farhan, namely, the transmission of DNA through saliva, could have accounted for the presence of the Appellant's DNA on the exterior surface of F1D3A, especially considering that his contemporaneous statements were recorded in Bedroom 1 itself.

132 For these reasons, we are not satisfied that the presence of the Appellant's DNA on the exterior surface of F1D3A pointed irresistibly to the conclusion that he was involved in packing the diamorphine into the 64 packets. We pause to note that the Appellant's DNA, apart from being found on the exterior surface of F1D3A, was also found on the exterior surface of F1E3 (one of the six medium-sized Ziploc bags), the exterior surface of G1 (the Mintek bag) as well as the exterior and interior surfaces of G1A (the plastic bag in the Mintek bag). The presence of the Appellant's DNA on these exhibits was not directly probative of the fact that he was involved in packing the diamorphine because these exhibits did not themselves constitute any of the 64 packets of diamorphine that were the subject matter of the first charge, even though they contained some of the packets in question (see [124] above). Further, the presence of the Appellant's DNA on the exterior surface of F1E3 would be consistent with his claim that he had placed the six medium-sized Ziploc bags (along with other items) into the Akira box after getting into a quarrel with Mashitta, which contention the Judge rejected (see GD at [75]).

133 It is convenient here to deal with another point concerning F1D3A. The Prosecution produced a report from the HSA which stated that the mini plastic bags used to pack the mini packets of diamorphine constituting F1D3A were manufactured by the same machine as that which was used to manufacture

certain unused mini plastic bags which were seized from Bedroom 1 (J2A). Under cross-examination, the Appellant accepted that J2A belonged to him. Mr Lau submitted that the inference to be drawn from this was that the Appellant was involved in packing the diamorphine.

134 However, it was not *put* to the Appellant that because the mini plastic bags used to pack the mini packets of diamorphine constituting F1D3A came from the “same stock” as the mini plastic bags constituting J2A, which belonged to him, it meant that he must have been involved in packing the diamorphine. This point was of such a nature and of such importance that, pursuant to the rule in *Browne v Dunn* (1893) 6 R 67, it should have been put to the Appellant to give him the opportunity to address it before it was made as a submission by the Prosecution, which Mr Lau rightly conceded at the hearing before us. This was a significant omission, especially because there was another plausible explanation as to why the diamorphine had been packed using mini plastic bags that belonged to the Appellant, which would have been entirely consistent with the Appellant’s defence that (among other things) the diamorphine had been left in the Flat on 26 January 2016 without his knowledge – namely, the diamorphine had been packed by Sufian and/or Faizal in Bedroom 1 using the empty mini plastic bags constituting J2A, which were in Bedroom 1 to begin with.

Our conclusion on the first charge

135 In that light, we are left with the Appellant’s account, which is that:

- (a) He did not know that Faizal would be bringing the trolley bag to the Flat on 26 January 2016.

(b) When Faizal arrived at the Flat at about 8.20pm on 26 January 2016, he was asleep, and Faizal was let in by the Helper, who took the trolley bag from Faizal and kept it in the storeroom.

(c) Although phone calls were made from and received on his iPhone at the time he was supposedly asleep, his iPhone was in Bedroom 1 then and Sufian could have been using it.

(d) He discovered several packets of diamorphine on the bed in Bedroom 1 the following afternoon (that is to say, on the afternoon of 27 January 2016), and after a row with his wife, he put the packets into the Akira box. He also discovered the trolley bag in the storeroom that same afternoon.

(e) He then called Faizal and Sufian asking them to remove the trolley bag and the drugs from the Flat, and they agreed (see [97]–[98] above).

136 None of these aspects of the Appellant’s defence was inherently incredible. Much of this account by the Appellant had already been put across in his statements to the CNB. In our judgment, this was sufficient to shift the evidential burden to the Prosecution. The Prosecution had access to each of the witnesses – Faizal, Sufian, Mashitta and the Helper – who were directly referred to in the Appellant’s narrative and who could have confirmed or, conversely, contradicted that narrative in material respects. The Prosecution also had the statements that had been recorded from these witnesses. The Prosecution declined all the Appellant’s requests for a number of these statements; it also failed to call these witnesses. In these circumstances, we are satisfied that the Prosecution failed to discharge its evidential burden to rebut the Appellant’s defence (see [68]–[71] above).

137 We therefore accept the Appellant's assertion that he had the diamorphine in his possession solely for the purpose of returning it to Sufian and/or Faizal, and find that he has rebutted the presumption of trafficking under s 17 of the MDA where the first charge of trafficking in the diamorphine is concerned. In the circumstances, we set aside his conviction on this charge.

138 We had earlier directed the Supreme Court Registry to seek the confirmation of the parties that in the event that this court allowed the Appellant's appeal against his conviction on the first charge, they would agree to this court amending this charge to one of possession of the diamorphine under s 8(a) of the MDA. Mr Jumabhoy had intimated as much during the hearing before us. For the purposes of s 390 of the CPC, we also sought confirmation from the Appellant that if the first charge were amended as stated, he did not intend to offer a defence to the amended charge.

139 Having received the parties' agreement and the confirmation sought, we amend the first charge to one of possession of the diamorphine under s 8(a) of the MDA. The Appellant accepts that he had possession and knowledge of the diamorphine, and we thus convict him on the amended charge accordingly.

140 In considering the appropriate sentence to impose on the Appellant in respect of the amended charge, we take into account the fact that the Appellant knew that he was in possession of a large quantity of diamorphine (not less than 63.41g). Notwithstanding that he was waiting for Sufian and/or Faizal to remove the diamorphine from the Flat, he must have known that he was committing an act that was connected to the illicit circulation of drugs. He knew, in particular, that Faizal was a supplier of drugs, and he must have known that the drugs would be put back into circulation after they were removed from the Flat. At the same time, this was not a case where the Appellant was safekeeping the

diamorphine for Sufian and/or Faizal pursuant to an agreed plan. Instead, the diamorphine was left in the Flat without the Appellant's knowledge, and he called the relevant individuals to ask them to remove it as soon as possible once he discovered it. In all the circumstances, we consider that a sentence of eight years' imprisonment, backdated to the date of the Appellant's remand, would be appropriate, and we sentence the Appellant accordingly on the amended charge.

Issue 2(b): The second charge of trafficking in the cannabis

141 We turn now to whether the Judge was right in finding that the Appellant was guilty of the second charge of trafficking in the cannabis. To reiterate, the Appellant's position on appeal is that he had possession of the trolley bag, but he believed that it contained cigarettes (instead of the cannabis), and he only had the trolley bag in his possession for the purpose of returning it to Faizal, who had left it at the Flat (see [29] above).

The element of possession

142 Turning, first, to the element of possession, the Appellant, as we have just mentioned, does not dispute this. In our judgment, he was right not to. The Appellant had physical possession, control or custody of the *substance* in the trolley bag that turned out to be the cannabis, and he knew of the existence of that *substance*, whatever it might eventually turn out to be (see *Adili Chibuike Ejike v Public Prosecutor* [2019] 2 SLR 254 (“*Adili*”) at [31]).

The presumption of knowledge under s 18(2) of the MDA

143 The next question is whether the Appellant has rebutted the presumption of knowledge of the nature of the drugs under s 18(2) of the MDA. Where an

accused person denies such knowledge, it is incumbent on him to state what he thought *was* in his possession, and the court will assess the credibility and veracity of his claim against the objective facts and his actions relating to the item in question (see *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [40]).

144 The Judge found that the Appellant knew that the trolley bag contained the cannabis (see [25] above). She rejected his defence that he thought the trolley bag contained cigarettes instead of drugs. In reaching this conclusion, there were two key findings that she made: first, the Appellant knew that Faizal would be bringing the trolley bag to the Flat on 26 January 2016; and second, the Appellant had directed the CNB officers to the storeroom after the diamorphine was seized from Bedroom 1 because he knew that there were drugs in the trolley bag, which was in the storeroom (see GD at [63] and [90]).

145 We address the second point below. As for the first point, we have dealt with this in the context of the first charge (see [104]–[114] above). In short, we see no reason to reject the Appellant’s evidence that he did not know that Faizal would be bringing the trolley bag to the Flat on 26 January 2016, and only discovered the trolley bag in the Flat the next day. He did not open the trolley bag. Thereafter, he called Faizal (as well as Sufian) to ask him to remove the trolley bag from the Flat, and Faizal (and likewise Sufian) agreed.

146 For present purposes, we should stress that there is also no reason for us to disbelieve the Appellant’s defence that he was told by Faizal that the trolley bag contained cigarettes. Indeed, Faizal had evidently left cigarettes in the Flat previously (see [13] above). In line with our analysis for the first charge, we note that the Prosecution could have called Faizal to rebut the Appellant’s defence, but it failed to do so. The points concerning the Prosecution’s

evidential burden and the drawing of adverse inferences (see [68]–[77] above) apply to the second charge equally.

The evidence of the events which transpired in the storeroom

147 We turn to the evidence in respect of the Appellant’s directing the CNB officers to the storeroom after the diamorphine was seized from Bedroom 1. The Judge relied on this to reach the conclusion that the Appellant *knew* that the trolley bag contained drugs and not cigarettes (see GD at [63]).

148 We begin by setting out the salient facts.

149 The search of Bedroom 1, where the diamorphine was found, concluded at around 8.40pm on 27 January 2016. At around 9.45pm, Senior SSgt Ika asked the Appellant a question. The precise question asked was disputed. Senior SSgt Ika testified that he asked the Appellant “*ada lagi*” (which means “still some more?”). On the other hand, the Appellant provided three versions of the question that was asked: “*ada barang salah*” (which means “any illegal things?”), “*ada barang salah lagi*” (which means any “any more illegal things?”) and “*ada barang lagi*” (which means “any more things?”). Whatever the precise question, the Appellant answered “storeroom” and was escorted there. The CNB officers thereafter found the cannabis in the trolley bag.

150 The Judge found that the Appellant’s version of Senior SSgt Ika’s question “kept evolving”, whereas Senior SSgt Ika was “consistent in his testimony” as to the question asked (see GD at [63]). With respect, given that the particular issue of just what the Appellant was asked was only explored at the trial some two and a half years after the relevant events in the Flat, we do not think it is fair to fault the Appellant for not remembering the precise question asked by Senior SSgt Ika. In fact, Senior SSgt Ika himself was not absolutely

certain of the question asked. His precise evidence was that “I *think* it’s ‘*ada lagi*’ because I usually keep the questions short and simple” [emphasis added]. Further, it appears that the question was unfortunately not documented in Senior SSgt Ika’s pocketbook as there would otherwise have been no need for Senior SSgt Ika to speculate about the precise question asked.

151 More importantly, regardless of the precise question asked, it is not disputed that Senior SSgt Ika did not *expressly* refer to drugs in his question. We are therefore content to proceed with the analysis on the assumption that the question asked was “*ada lagi*”, although we note that there was nothing in the evidence to help resolve this ambiguity. The more pertinent point, in our judgment, is what the Appellant *understood* from Senior SSgt Ika’s question. On this point, the Prosecution put it to the Appellant that he understood the question to mean “any more drugs” or “still some more drugs”. The Appellant disagreed. His position, which he maintained consistently, was that he was directing the CNB officers to the contraband cigarettes in the storeroom. It is not disputed that contraband cigarettes were indeed seized from the storeroom by the CNB officers and thereafter handed over to Singapore Customs.

152 The Judge found that the context supported the inference that the Appellant understood Senior SSgt Ika to be asking whether there were any more drugs in the Flat. We disagree for the following reasons.

153 First, the Judge observed that Senior SSgt Ika asked the Appellant the question *after* Bedroom 1 had been searched and a large amount of diamorphine uncovered there. This, however, does not take into account the fact that Senior SSgt Ika’s question was asked *more than an hour* after the diamorphine was seized. The inference that the Appellant understood Senior SSgt Ika to be asking whether there were any more drugs in the Flat might have been a more

compelling one if the Appellant had been asked the question *immediately* after the diamorphine was found. Further, there was little evidence as to what transpired during the intervening one hour, except for some evidence that the CNB officers had allowed the Appellant to call Sufian at around 9.31pm.

154 Second, the Judge also pointed out that the Appellant was aware that the officers were from the CNB and were conducting a raid for drugs rather than contraband cigarettes. With hindsight, it might seem logical to expect that the CNB would, in the course of a raid for drugs, focus on drugs and not contraband cigarettes. But this is hardly determinative of the issue. Indeed, as we have noted, the CNB officers did seize the contraband cigarettes that were found in the storeroom. But this is a distinct point from the one that is more pertinent to the facts before us, which is that since the Appellant knew that the CNB officers were conducting a raid for drugs, it would not have been unreasonable for him to think that he should come clean on other illegal items stored in the Flat.

155 Third, there was some dispute at the trial as to what, if anything, the Appellant had pointed to in response to Senior SSgt Ika's question. Whatever it was, when the CNB officers seized the trolley bag, they never asked the Appellant what was in it. The CNB officers had instead removed several blocks of vegetable matter from the trolley bag and asked the Appellant whether he knew what they were and whether they belonged to him. While the Appellant recognised that the blocks of vegetable matter were cannabis, he denied that they belonged to him.

156 In these circumstances, it seems to us that on no account can it be concluded, solely on the basis of the question asked by Senior SSgt Ika and the Appellant's response, that he knew that the trolley bag contained the cannabis. This is why the Judge's conclusion that the Appellant had the requisite

knowledge of the nature of the drugs rested in material part on her finding that he knew that Faizal would be bringing the trolley bag to the Flat on 26 January 2016. We have explained why we do not accept that finding.

Our conclusion on the second charge

157 What we are left with then is the Appellant's account of what had transpired in respect of Faizal's bringing the trolley bag to the Flat. That account included his assertion that he thought the trolley bag contained cigarettes, which was what Faizal had told him and which Faizal apparently did bring from time to time. This was not inherently incredible, and it shifted the evidential burden to the Prosecution, but nothing at all was led by the Prosecution in the way of evidence to discharge that burden. Accordingly, for the reasons set out above, we are satisfied that the Appellant has rebutted the presumption of knowledge under s 18(2) of the MDA where the second charge is concerned. The question of trafficking therefore does not arise in relation to this charge. In any event, the element of possession of the cannabis for the purpose of trafficking would not have been made out for the same reasons as those we have given in relation to the first charge.

158 In the circumstances, we allow the Appellant's appeal in relation to the second charge of trafficking in the cannabis and acquit him of it. To be clear, as the Prosecution has, in our judgment, failed to establish that the Appellant knew that the trolley bag contained the cannabis, he cannot be found guilty even of an offence of possession of the cannabis under s 8(a) of the MDA.

Wilful blindness

159 For completeness, we note that the Prosecution *did not* run an alternative case based on wilful blindness at the trial, neither did it seek to raise any

arguments concerning wilful blindness on appeal. Instead, the Prosecution's primary case was that it had proved that the Appellant had actual knowledge of the cannabis. In the alternative, the Prosecution submitted that the Appellant was presumed to have knowledge of the cannabis by virtue of s 18(2) of the MDA (see GD at [44]). It is thus not necessary to consider whether the Appellant was wilfully blind to the cannabis in the trolley bag in the present case.

160 However, our preliminary view is that the doctrine of wilful blindness would not have been engaged in the present case even if the Prosecution had run a case based on it.

161 There is nothing before us to suggest that the Appellant deliberately refused to check the contents of the trolley bag in the face of suspicion *in order to cheat the administration of justice* (see *Adili* ([142] *supra*) at [66]). Here, the evidence indicated that the Appellant *did* check with Faizal what was in the trolley bag and also told him to remove it from the Flat. Faizal informed the Appellant that the trolley bag contained cigarettes and also agreed to remove it from the Flat. There was no reason for the Appellant to disbelieve Faizal. On his case, the Appellant was not a courier who was transporting goods and who would therefore be bound to check what it was that he was transporting. We leave it at that since the point was not taken by the Prosecution.

Issue 3: Excessive judicial interference

162 We turn finally to the last issue, which is whether there was excessive judicial interference at the trial. The Appellant submitted that there were numerous examples of the Judge “descending into the arena” and “taking over the conduct of the questioning of witnesses”, and the impression thus given was

that her vision had been “clouded by the dust of the conflict” (an expression taken from the decision of the English Court of Appeal in *Yuill v Yuill* [1945] P 15 (“*Yuill*”) at 20). The Appellant submitted that the Judge did not merely ask clarificatory questions, but instead engaged in long and sustained bouts of questioning, and her interventions were at times at crucial points which interrupted counsel’s line of questioning. Nevertheless, the Appellant did not suggest that the Judge was biased. Mr Jumabhoy also clarified that he was not seeking for the matter to be reheard before another judge. Rather, Mr Jumabhoy submitted that, in fairness to the Appellant, we should convict him only of what we were satisfied was safe to convict him of in all the circumstances, and that would be an amended charge of possession of the diamorphine under s 8(a) of the MDA. Mr Jumabhoy submitted that the Appellant should accordingly be acquitted of the two capital trafficking charges to which he had claimed trial.

163 For the reasons explained above, this indeed is the result we have been driven to, having examined the evidence. That makes it strictly unnecessary for us to consider and rule upon the issue of excessive judicial interference. We do not, in any event, accept Mr Jumabhoy’s submissions as to the Judge’s conduct of the trial. Nonetheless, we take this opportunity to set out the applicable principles in relation to a judge’s conduct of criminal proceedings.

The general principles

164 It is helpful to begin by reiterating that a complaint of *excessive judicial interference* ought not to be conflated with a complaint of *apparent bias*. We explained the distinction between the two concepts in *BOI v BOJ* [2018] 2 SLR 1156 (“*BOJ*”) in the following terms (at [112]):

... [T]he resolution of a complaint of excessive judicial interference depends not on *appearances* or what *impressions* a fair-minded observer might be left with, but rather on whether

the reviewing court is satisfied that the manner in which the challenged tribunal or judge acted was such as to *impair its ability to evaluate and weigh the case presented by each side*. [emphasis added]

165 Properly construed, the ground of excessive judicial interference is concerned with the failure of the court to observe its proper role and its duty not to descend into the arena (see *BOI* at [112]). At the same time, judges are fully entitled to pose questions to witnesses and counsel in order to *understand and clarify* the evidence and the issues in dispute. In this regard, we stated the following principles in *Mohammed Ali bin Johari v Public Prosecutor* [2008] 4 SLR(R) 1058 (“*Mohammed Ali*”) at [175]:

... [T]he judge is not obliged to remain silent, and can ask witnesses or counsel questions if (*inter alia*):

- (i) it is necessary to clarify a point or issue that has been overlooked or has been left obscure, or to raise an important issue that has been overlooked by counsel; this is particularly important in criminal cases where the point or issue relates to the right of the accused to fully present his or her defence in relation to the charges concerned;
- (ii) it enables him or her to follow the points made by counsel;
- (iii) it is necessary to exclude irrelevancies and/or discourage repetition and/or prevent undue evasion and/or obduracy by the witness concerned (or even by counsel);
- (iv) it serves to assist counsel and their clients to be cognisant of what is troubling the judge, provided it is clear that the judge is keeping an open mind and has not prejudged the outcome of the particular issue or issues (and, a fortiori, the result of the case itself).

166 Thus, for excessive judicial interference to be established, it would generally be necessary to show that the situation was “an *egregious* one” [emphasis in original] (see *Mohammed Ali* at [175(g)]). Plainly, where a complaint of excessive judicial interference is made on appeal, the appellate

court will consider whether the court below *has in fact acted* in a manner that has resulted in *actual prejudice* to the relevant party; the relevant inquiry is not whether a fair-minded person would *reasonably suspect or apprehend* that the court below was biased (see *BOI* at [112]). Actual prejudice could, for instance, arise if a judge intervenes in the proceedings to such an extent that it prevents a party from presenting its case.

Whether there was excessive judicial interference in the present case

167 As to whether there was excessive judicial interference in the present case, having examined the record of the proceedings and considered Mr Jumabhoy's submissions most carefully, we are satisfied that there was not. While the Judge did direct a fair number of questions during the trial to various witnesses, including the Appellant, in our judgment, it was plain that she did so in an effort to *ensure* that she had correctly understood the evidence. This was especially warranted in this case, where the questions put by counsel who appeared at the trial were at times wanting in specificity and/or clarity.

168 We do not think it is necessary or helpful to list the various instances where it was suggested that the Judge interfered excessively. However, quite apart from his general contentions regarding excessive judicial interference, there was one distinct point made by Mr Jumabhoy that we think ought to be highlighted. This was the point that the Judge ought not to have required the Appellant to give advance notice of his case before he had been called to give his defence. In brief terms, when counsel was cross-examining ASP Peh on the swabbing process for F1D3A (see [127] above), the Judge intervened to ask what the Appellant's case was as to whether the Appellant had touched the ten mini packets of diamorphine constituting F1D3A. The Judge then asked counsel to take the Appellant's instructions as to where the various packets of

diamorphine were in Bedroom 1 and counsel did not object. While there was nothing objectionable about these questions in so far as they were asked by the Judge to *understand* the Appellant's defence, the issue was one of *timing*. With respect, the Judge ought to have asked these questions only after the Appellant had been called to give his defence following the close of the Prosecution's case. Even so, we are amply satisfied that this did not result in any actual prejudice to the Appellant so as to constitute impermissible or excessive judicial interference.

Guidelines on judicial conduct in criminal proceedings

169 Notwithstanding our view that there was no excessive judicial interference in this case, given the importance of this issue, we think it would be useful to provide some guidance on the applicable principles which ought to guide a judge's conduct *in the specific context of criminal proceedings*. These principles ought to apply with especial force in criminal matters, where the implications of excessive judicial interference on an accused person's life and liberty may be severe.

170 We highlight below six points that a judge must generally be mindful of and, more broadly, the need for a judge to exercise greater caution, prudence and restraint in conducting criminal proceedings as compared to civil proceedings. These points are, of course, not intended to be exhaustive.

171 First, in criminal proceedings, it is the Prosecution's burden to prove its case against the accused person beyond a reasonable doubt. As we have repeatedly emphasised in our recent decisions, it is for the Prosecution, and not the judge, to fill in any gaps in the Prosecution's case (see *Mohamed Affandi bin Rosli v Public Prosecutor and another appeal* [2019] 1 SLR 440 at [52];

Ramesh ([28] *supra*) at [1]–[2]). As we explained in *Mui Jia Jun v Public Prosecutor* [2018] 2 SLR 1087 (“*Mui Jia Jun*”) at [76]:

... The principle that the Prosecution must prove the guilt of the accused beyond reasonable doubt is a cornerstone of our criminal law. That principle implies that it is incumbent on the Prosecution, and not the court, to address any weakness in the evidence that the Prosecution adduces, failing which the Prosecution must accept the consequences that follow for its case against the accused.

172 This is not least because while the Prosecution is charged with a number of significant burdens (such as having to prove its case against the accused person beyond a reasonable doubt), it has access to the police, the investigating authorities, as well as witnesses and their statements, and is also armed with and assisted by various tools (such as statutory presumptions). It follows then that a judge should not ask questions that would reasonably be seen as having the effect of filling for the Prosecution gaps in its case. In this regard, we endorse Lee Seiu Kin J’s observations in *Ng Chee Tiong Tony v Public Prosecutor* [2008] 1 SLR(R) 900 (“*Ng Chee Tiong Tony*”) as follows at [22]:

... [W]hile it is entirely proper for a trial judge to ask questions to clarify an unclear answer, or even to establish a crucial point (which I should add must be done with circumspection and in a neutral manner), what was done in the present case went past that. It is the duty of the Prosecution to bring out the evidence to prove its case; it is not the judge’s duty to do so, and certainly not to take over the cross-examination to make up for any shortfall in the conduct of the case by the prosecutor. And it is certainly not for a trial judge to test the credibility of a witness by sustained questioning. ...

173 Second, in criminal proceedings, there are strict rules of procedure which provide that it is for the Prosecution to first prove a *prima facie* case *before* the Defence may be called or even invited to set out material aspects of its position. Section 230(1)(j) of the CPC provides that the court may only call on an accused person to give his defence if it is satisfied that there is some

evidence which is not inherently incredible and which, if accepted, would satisfy each and every element of the charge against the accused person. In the course of the Prosecution's case, a judge should therefore *not* ask questions of the Defence which would require the accused person to give advance notice of his case before he is called to give his defence, given that at this stage, the Prosecution would have yet to discharge its burden to prove a *prima facie* case.

174 Third, we turn to the Prosecution's task of presenting its case at the trial. The court clearly does not have access to all the information that the police or other investigating authorities will have gathered over the course of the investigations, which information the Prosecution will have had access to. Accordingly, if the Prosecution chooses not to explore certain lines of inquiry with its witnesses or advance certain case theories, there might be good reasons for its choices, which the trial judge might not fully appreciate (see *Mui Jia Jun* at [77]). The judge should, for this reason, ordinarily refrain from exploring other lines of inquiry.

175 Fourth, we turn to the accused person and the giving of his evidence-in-chief at the trial. Unlike a party to a civil matter who gives his evidence-in-chief by affidavit, an accused person gives his evidence-in-chief orally at the trial. There are at least two reasons why a judge should exercise considerable restraint in intervening at this stage, as observed by the English Court of Appeal in *Regina v Gavin Inns, Emma Inns* [2018] EWCA Crim 1081 ("*Gavin Inns*"). The first is that it is not a judge's role to cross-examine an accused person. Rather, it is the Prosecution's role to do so, and that will, of course, be done *after* the accused person has finished giving his evidence-in-chief (see *Gavin Inns* at [36]). Second, an accused person should have the opportunity to give his account in the way that he would like his evidence to come out, "elicited though

questions from [his] own advocate”, without constant interruptions that may prevent him from doing so (see *Gavin Inns* at [37]).

176 Moreover, as we have just noted, in criminal proceedings, parties do not set out their cases before the trial in the way that it is done in civil proceedings. In civil proceedings, the issues in dispute are typically set out in the pleadings and the contest is quite clearly defined. With the witnesses’ evidence-in-chief given by affidavit, there is much less risk of a witness not having the opportunity to give his account in the manner that he wants to. It is thus important for a trial judge to be conscious of the need to exercise greater restraint in criminal proceedings when questioning an accused person during his evidence-in-chief.

177 Fifth, courts have repeatedly observed that witnesses generally tend to enter the witness box in a nervous state, and this would apply with greater force to an accused person whose life and liberty is at stake. The words of the English Court of Appeal in *R v Kolliari Mehmet Hulusi* (1973) 58 Cr App R 378 at 385, which we cited in *Mohammed Ali* ([165] *supra*) at [131], bear repetition:

It is a fundamental principle of an English trial that, if an accused gives evidence, he must be allowed to do so without being badgered and interrupted. Judges should remember that most people go into the witness-box, whether they be witnesses for the Crown or the defence, in a state of nervousness. They are anxious to do their best. They expect to receive a courteous hearing, and when they find, almost as soon as they get into the witness-box and are starting to tell their story, *that the judge of all people is intervening in a hostile way*, then, human nature being what it is, they are liable to become confused and not to do as well as they would have done had they not been badgered and interrupted. [emphasis added]

178 We italicised a portion of the above extract because it is important for a judge to remember that he or she will most likely have a very different effect on a witness as compared to the cross-examining counsel. Citing *Yuill* ([162]

supra), Lee J made a similar observation in *Ng Chee Tiong Tony* ([172] *supra*) at [22]:

... [I]t is well known that witnesses often respond differently to a judge as compared with cross-examining counsel. As Lord Greene MR pointed out in *[Yuill]* at 20:

[A]s everyone who has had experience of these matters knows, ... the demeanour of a witness is apt to be very different when he is being questioned by the judge from what it is when he is being questioned by counsel[.]

179 In these circumstances, it would not be far-fetched to suggest that there might be a tendency for an accused person to present himself as agreeably as possible to the judge so as not to upset him or her. The Malaysian Court of Appeal in *Ahmad Norizan bin Mohamad v Public Prosecutor* [2017] 6 MLJ 326 made a similar point at [24]:

... [C]ross-examination by a judge has a different effect on a witness as opposed to cross-examination by an advocate. A witness understands readily that the opposing advocate is an adversary unlike the judge who will be the decider of the dispute between the parties. There will always be huge pressure on a witness, and especially more so in the case where the witness is the accused person, when questioned by a judge as apart from being the decider of the truth in each case, the judge also commands great respect and deference in a courtroom. In such a setting, it is possible for an unsophisticated accused person to succumb to suggestions put forward by the judge so as not to appear disagreeable or even impolite.

180 Sixth, a judge should refrain from asking leading questions generally as it may help a party with the direct examination or cross-examination of a witness, especially a material witness. In *Ng Chee Tiong Tony*, the trial judge seemed to have taken a position and pursued it in her questioning of the appellant; she framed her questions from the position that the appellant was not telling the truth (at [23] and [25]); she asked almost as many questions as the prosecutor, and many of her questions were leading questions and/or in the nature of cross-examination (at [5], [8] and [24]); a number of points that she raised had not

been surfaced by the prosecutor in his cross-examination of the appellant; *based on the appellant's answers to her questioning*, she then made crucial adverse findings of fact in her grounds of decision, particularly in relation to the appellant's credibility as a witness (at [23]). In these circumstances, it was unsurprising that Lee J quashed the appellant's conviction.

181 The six points outlined above are not remarkable ones, and we have every confidence that trial judges in all our courts apply them each and every day in each and every case that they try. Nonetheless, we think a reminder to all those involved in criminal proceedings – judges, prosecutors and defence counsel – would not be out of place.

Conclusion

182 In summary, having examined the facts and the evidence before us, we allow the Appellant's appeal in relation to the first charge of trafficking in the diamorphine, and convict him on an amended charge of possession of the diamorphine under s 8(a) of the MDA. We sentence him to a term of eight years' imprisonment, backdated to the date of his remand, on the amended charge.

183 Further, we allow the Appellant's appeal in relation to the second charge of trafficking in the cannabis and acquit him of it.

184 We briefly mention one remaining matter.

185 At the hearing of the appeal, the Prosecution submitted that it would disclose to the Defence the statements of Sufian, Faizal, Mashitta and the Helper if we held that it was under a duty to do so. In that event, if the Defence decided to call these witnesses, it was suggested that the matter could be remitted to the Judge pursuant to s 390(1)(b)(i) of the CPC. To be clear, our judgment in this

appeal does not turn on the Prosecution's non-disclosure of these witnesses' statements. We have found that it was the *Prosecution*, and not the *Defence*, who ought to have called these witnesses, given its evidential burden to rebut the claims made by the Appellant. As the Prosecution has failed to prove that the Appellant is guilty of either of the two capital trafficking charges that it brought against him, there is simply no basis for this matter to be remitted to the Judge.

Sundaresh Menon
Chief Justice

Judith Prakash
Judge of Appeal

Steven Chong
Judge of Appeal

Andre Darius Jumabhoy and Priscilla Chia Wen Qi
(Peter Low & Choo LLC) for the appellant;
Kow Keng Siong, Lau Wing Yum, Sarah Ong, Chan Yi Cheng,
Desmond Chong and Wu Yu Jie
(Attorney-General's Chambers) for the respondent.

ABDULLAH ZAWAWI OMAR
v.
PUBLIC PROSECUTOR

Supreme Court, Kuala Lumpur
Salleh Abas LP, Wan Suleiman, Syed Agil Barakbah SCJJ
[Criminal Application No: 20 Of 1984]
8 January 1985

JUDGMENT**Salleh Abas LP:**

[1] The applicant was the former manager of FELDA Scheme at Kampong LBJ, Labu (the Scheme). He came to the Scheme in 1973 having been transferred from Bukit Senawang Utara. As the manager of the Scheme, he took charge of the financial matters, maintained cash books and held the key to the safe which was in his office. On 1 November 1976 he was to go on transfer to Tanjong Malim and be succeeded by a new manager, Haji Hassan. As the handing over of responsibilities was not completed the applicant still remained at the scheme. However, prior to this between 25 October 1976 and 30 November 1976 he attended a course at the University Pertanian, Serdang.

[2] The Scheme has an account with the Malayan Banking. On 3 November 1976 the applicant withdrew RM70,000 cash from the bank.

[3] On 5 November 1976 the applicant was working late and did not leave the office until past 8.00 pm Omar bin Yahya, the watchman, testified that when he reported for duty that evening, at 6.00 pm, he saw many people at the office, and that with permission of the applicant he went home to have a bath. When he came back to the office at about 8.00 pm he found the applicant's office still open and that the applicant was still in it. He heard a sound coming from the applicant's office as if a table was being dragged on the floor. At that time the door of the applicant's room was open, though its spring door was closed. After the dragging sound, lights were switched off, the door was locked and the applicant came out of his room and met the watchman. After five or six minutes' conversation between them the applicant left for his house and the watchman was left alone to guard the office. About half an hour later the watchman locked the office's main door and went to a coffee stall nearby. After having his coffee he returned to the office. About an hour later, assistant Manager Hamzah came into the office to collect his work-book and left. After Hamzah had left, the watchman again locked the main door, and went to the same coffee stall. When he came back an hour later, he opened the main door, went in and locked it from inside. Whilst inside the office he noticed that the phone which was located between the applicant's room and the general office was covered by a book. Access to the phone from the applicant's room was by means of a small opening of about 8" x 12" on the wall of the applicant's room. The opening was so small that it was not possible for anyone to enter the room



through it. However, suspecting that someone had entered the room, the watchman shone his torchlight into the applicant's room and there he saw the door of the safe open and the cement wall which held the cross bar securing the safe on the left side broken. The door of the room was nevertheless still locked, but one of the windows was open. He did not notice any of the windows open earlier during his trips to and from the office and the coffee stall.

[4] On discovering this incident the watchman called the applicant who came and opened his office room with his own key and then examined the safe. After this, both went to the Police post at the Scheme to lodge a report.

[5] Inspector Wan Abdul Ghany, PW4, the IO in the case visited the applicant's office-room the next day, on 6 November 1976, at 8.10 am. He did not see any sign of the breaking-in nor any sign of the safe being forced open. He also noticed that the wire-grills on top of the room was not forced open. In fact the safe could only be opened with its own key which was then being kept by the applicant. Some coins amounting to RM509.35 were found in the safe.

[6] Adnan bin Mohd Ali, PW10, who was an officer in the Treasury Division of FELD A Headquarters, Kuala Lumpur, said that upon examination of the financial records of the Scheme as on 6 November 1976, the amount of cash which the Scheme should have had was RM24,415.22 and that since there was only RM509.35, the shortage was RM23,905.87.

[7] The conduct of the applicant on the night of 5 November 1976, as observed by the watchman, was that he was stunned and sad. Inspector Wan Abdul Ghany, the IO, gave evidence that the applicant was very concerned about a "Dumex" tin. In order to prevent it from falling into the police hands, he asked his wife to throw it away. Anyhow the police took possession of it and discovered cash RM3,000 hidden underneath uncooked rice in the tin.

[8] The learned President found as a fact that this cash was not part of the missing money because it was satisfactorily explained by the applicant.

[9] On the basis of this evidence the applicant was charged and convicted of an offence of CBT by a public servant for the sum of RM23,905.87 under s 409 of the Penal Code and sentenced to 18 months' imprisonment. His appeal to the High Court was dismissed.

[10] He came to us asking leave under s 66(1) of the Courts of Judicature Act to determine four questions, which, his Counsel submitted, raise points of law of public importance and affect the outcome of his case.

[11] There can be no doubt that the learned President was right in coming to the conclusion that the applicant was a public servant within the meaning of s 21 of the Penal Code, and that he was entrusted with property or having dominion over it. The only issue that concerned the Court was whether there was a dishonest misappropriation of it. (s 405 of the Penal Code).



[12] As regards entrustment, there is ample evidence to prove it. As the manager of the Scheme the applicant was solely responsible for financial affairs of the Scheme and he personally kept and maintained cash books and also personally went to the bank to withdraw money and held the key to the safe where cash was being kept.

[13] As regards proof of misappropriation this is a matter of inference from the evidence and circumstances. The money in hand on 6 November 1976 should have been RM24,415.22, but it was found to be RM509.35 only. So there was a shortage of RM23,905.87, which had to be accounted for.

[14] The prosecution's case which was believed by the learned President was that the applicant himself took the money and that to cover his misdeed he faked a breaking-in.

[15] The safe had two keys. One key was a key to the padlock which secured a cross-bar fastened to the safe. This key was at the material time in the possession of the chief clerk. The cement wall which held the cross-bar into which the padlock was fastened had broken off. The other key was the key which would open the door of the safe itself. This key was with the applicant. A lock-smith who gave evidence for the prosecution said that the safe door could only be opened with the key in the applicant's possession or with a duplicate key.

[16] The question at the trial was whether the applicant faked the breaking-in of the safe. The prosecution said he did and this was accepted by the learned President. He must have held this view because the door of the applicant's office room was locked and the safe could only be opened with the safe key in his possession. If the applicant was the one who faked the incident it as an irresistible inference that he took the money in the safe and this would be proof of dishonest misappropriation. There have been a lot of cases like this where an accused person who could not account for the loss of the property under his care was held to be rightly convicted to CBT. On the other hand, if the applicant did not fake the breaking- in of the safe, ie he neither caused the cross-bar to fall off from its cement casing, nor opened the door of the safe with his key - there would be a doubt that he dishonestly misappropriated the money in it.

[17] Thus the question in the ultimate analysis is whether someone else did the job or whether it was done by the applicant himself. The applicant did not give evidence on oath, but his statement from the dock did not differ from the evidence of the prosecution.

[18] Looking at the questions for which leave for the reference was asked for, we are of the view that they all deal with questions of fact, and therefore, hardly qualify for the reference. However, upon examination of the records we find that there are some unsatisfactory features in the trial of the applicant showing that the case against him fell short of proof beyond reasonable doubt. These are:



[19] Firstly, although during the last week of October 1976 the safe key was in the possession of the Assistant Manager and was only returned to the applicant on 1 November 1976, no evidence was led whether there was actual or physical checking of the money inside the safe by both of them, ie how much money was in the safe at the time when the key was handed over to the Assistant Manager, and how much was it when the key was returned to the applicant.

[20] Secondly, despite the fact that the Assistant Manager went into the office building on the night of 5 November 1976 ie, the night when the safe was broken into, no evidence was led to as to how long he stayed in the office building, and what he did there and whether he noticed anything unusual in that building.

[21] Thirdly, there is an unchallenged evidence that the safe could be opened by a duplicate key and that duplicate key could be made and that the time during which the key was with the Assistant Manager was long enough for a duplicate key to be made, if he wished to make one.

[22] These three matters could only be explained by the prosecution by calling the Assistant Manager himself. Instead, the prosecution chose to offer him to the defence, and the defence quite rightly declined to call him as its witness.

[23] Fourthly, although all the windows of the office building were closed, after the breaking-in of the safe, one of the windows of the applicant's office room was found to be open. According to the evidence the responsibility of opening and shutting the windows was that of the office-boy. He was not called to explain whether he had bolted all the windows on that evening.

[24] In view of these unsatisfactory features, the learned President should not have called upon the defence and likewise the learned Judge below should have allowed the appeal. However, at our suggestion Counsel for the applicant withdrew all the questions and substituted therefor the following question:

Although the prosecution has the right not to call every witness from whom a police statement has been taken, the question is how far does that right extend?

[25] We allowed leave to the applicant to deal with this question.

[26] The practice of making available a witness or witnesses from whom statements have been taken is to prevent the defence from commenting upon the honesty of the prosecution and thus invoking the often-quoted presumption of adverse inference under s 114(g) of the Evidence Act. But where the prosecution's evidence falls short of proving *prima facie* case at the end of its case, the right not to call such witness/witnesses and to make him/them available to the defence will be of no avail. If the doubt consists of the gap arising out of the matters adumbrated earlier, the prosecution must close this gap. It is not for the defence to call the offered witness/witnesses to supplement the prosecution's case.



[27] In the circumstances of this case, the Assistant Manager should have been called to explain those three matters and the office-boy to explain about the windows. It may well be that if these two were called, their evidence would be favourable to the prosecution, but unless they had given their testimonies, the Court could not be sure and should not indulge in conjectures and possibilities.

[28] Thus, our answer to the question for which we granted leave should be that the prosecution's right not to call a witness from whom statements have been taken must always be guided by its duty to discharge the onus of proof.

[29] Since the answer to the question affects the event of the applicant's appeal to the High Court we quashed his conviction and sentence.



GNANASEGARAN PARARAJASINGAM

v.

PP

[1995] 2 MLRA 555

Court of Appeal, Kuala Lumpur
Shaik Daud Ismail, Mahadev Shankar JJCA, Abdul Malek Ahmad J
[Criminal Appeal No: W-09-5-95]
25 October 1995

Legal Profession: *Solicitor and client — Improper management of client's account — Use of client's money to settle a solicitor's liability to another client — Whether a criminal offence — Whether client's money lost its identity when it merged with money already in client's account — Whether client could be paid with money from any number of client accounts*

Evidence: *Documentary evidence — Computer printout — Admissibility — Whether computerised evidence of bank transactions admissible — Whether compulsory for prosecution to produce a certificate signed by person in charge of computer which produced the printout — Whether failure to produce certificate fatal*

The appellant, an advocate and solicitor, was hired by the complainant following the death of her husband to act for her deceased husband's estate. He accepted money totalling RM6,576.16 from the estate, and an additional RM133,000 from the insurance company. The appellant deposited these sums of moneys into his office and client's accounts respectively. The bank officer in charge of the two accounts stated that when the Bank decided to close the accounts, the respective credit balances of the accounts stood at RM401.02 and RM39.69 respectively. The appellant had not by then remitted any payment to the complainant, and the courts below held that criminal breach of trust in the circumstances had been proved against the appellant. The appellant appealed and contended that the judge erred in admitting and acting on bank officer's evidence. The bank officer relied mainly on the computer printouts which in turn highlighted the various transactions that the appellant had executed in respect of the two sums of money. The appellant contended that the bank officer's evidence was not admissible because s 90A of the Evidence Act 1950 ("EA") required that in the case of computerised records, a certificate had to be produced to authenticate the records.

Held (dismissing the appellant's appeal):

Per Shaik Daud Ismail JCA:

(1) The appellant did not challenge the bank officer's evidence by way of cross-examination. Thus, the prosecution succeeded in proving that the documents were admissible. Since the appellant relied solely on this one ground of appeal,



there was no merit in the appellant's arguments that the whole of the bank officer's evidence should be rejected. There was ample evidence to prove the misappropriation and the appellant was rightly convicted. (paras 19-20)

Per Mahadev Shankar JCA (concurring):

(2) The bank officer's was the branch officer in charge of the operations of the branch and was responsible for the conduct of the activities of the branch for which that computer was used. He could have issued a certificate as required by s 90A(2) of the EA and without his actual presence all the computer generated documents would have been admitted in evidence as provided by s 90A(1). The *viva voce* evidence of the man in the witness box counts for more than a certificate issued by him. (para 31)

(3) Section 90A of the EA was enacted to bring the "best evidence rule" up to date with the realities of the electronic age. The effect of s 90A(1) in the present scenario was that it was no longer necessary to call the actual teller or bank clerk who keyed in the data to come to court provided he did so in the course of the ordinary use of the computer. (paras 33-34)

(4) Rule 3(2) of the Solicitors' Account Rules 1978 permits a solicitor to maintain more than one client's account, but r 7(a)(i) only permits the withdrawal of a client's money "for a payment to or on behalf of the client". The effect of r 7(a)(i) is that the complainants' money could only be taken out to pay the complainants or to their order. To use one client's money to settle a solicitor's liability to some other client was a criminal offence. (paras 44-45)

Case(s) referred to:

Khoo Hi Chiang v. PP [1993] 1 MLRA 701; [1994] 1 MLJ 265; [1994] 2 CLJ 151; [1994] 1 AMR 323 (*refd*)

Lyn Hon Yap v. PP [1953] 1 MLRA 392; [1956] MLJ 226 (*refd*)

Perumal v. PP [1970] 1 MLRA 25; [1970] 2 MLJ 265 (*refd*)

Legislation referred to:

Criminal Procedure Code, s 322(3)

Evidence Act 1950, ss 3, 32(b), 60, 90A(1), (2), (4), (6), 90B, 90C, 106

Penal Code, s 409

Solicitors' Account Rules 1978, rr 3(2), 7(a)(i)

Other(s) referred to:

Consolidated Subject Index of the Malaysian Law Journal, 1932-1991, pp 551-552

Counsel:

For the appellant: Shahul Hameed Amirudin; M/s Albar Zulkifly & Yap

For the respondent: Mohamed Yusof Zainal Abiden; DPP



JUDGMENT**Shaik Daud Ismail JCA:**

[1] The appellant, an advocate and solicitor, was charged on 30 September 1993 before the Kuala Lumpur Sessions Court with two counts of criminal breach of trust. On the first count, he was charged that between 12 June 1987 and 19 May 1988, as an agent, in that in his capacity as the solicitor of the estate of one Tee Seng Pun @ Tee Seng Yeat (deceased) and being entrusted with dominion over a sum of RM6,576.16, he had committed criminal breach of trust of the said sum and had thereby committed an offence under s 409 of the Penal Code. On the second count, he was charged that other vehicle through a firm of solicitors Messrs Tong Teck Yong & Co on 18 October 1983. Eventually, the appellant's firm Messrs PG Segran & Associates took over the case. The appellant's firm was also involved in making a claim with the Employees Provident Fund (EPF). It is common ground that the firm of Messrs PG Segran & Associates was wholly owned by the appellant. The case was eventually settled out of Court and a consent judgment was recorded by the High Court on 19 May 1987 whereby the Court ordered as follows:

- (a) the complainant was awarded RM98,700;
- (b) RM8,000 was awarded to the estate of Tee Seng Pun;
- (c) the complainant was also awarded an additional RM11,300 as compensation;
- (d) the complainant's son was awarded RM2,500 as compensation;
- (e) the complainant's sister awarded RM2,500 as compensation;
- (f) costs agreed or to be taxed to plaintiffs.

[2] Following this consent order, Pacific and Orient Insurance Sdn Bhd made four payments to the appellant totalling RM133,000, which included RM10,000 as agreed costs, to be paid over to the plaintiffs as ordered by the Court. The amounts were then paid to the appellant's firm which went into the client's account at the then United Asian Bank. This amount represented the subject matter of the second between 22 September 1987 and 27 May 1988 being an agent and in his capacity as solicitor of one Ng Ju Hiang, Ng Juey Hung, Tee Yit Hong and the estate of one Tee Seng Pun @ Tee Seng Yeat (deceased) and being entrusted with dominion over a sum of RM133,000, he had committed criminal breach of trust of the said sum and had thereby committed an offence under s 409 of the Penal Code.

[3] After a lengthy trial, the Sessions Court convicted the appellant and sentenced him on the first count to imprisonment for 12 months and on the second count to imprisonment for 18 months. The Court also ordered the sentences to run concurrently. His appeal to the High Court was on 21 March 1995 dismissed



and the Court confirmed the convictions and sentences imposed. In addition, the High Court purporting to act on its own volition under the provisions of s 322 ordered the appellant to pay RM10,000 as costs in default of which he shall suffer an additional imprisonment of 12 months. The appellant was eventually released on bail pending appeal to this Court.

[4] The facts of the case that on 19 September 1981 Ng Ju Hiang the complainant together with her sister Ng Juey Hong and son Tee Yit Hong were travelling in a taxi driven by her husband Tee Seng Pun. An accident occurred and Tee Seng Pun died and the complainant, her sister and her son were injured. As a result of the accident, the complainant took legal action against the driver, of the charge.

[5] In respect of the first charge, the subject matter was the EPF contribution belonging to the late husband of the complainant. EPF made a direct payment of RM6,576.16 to the complainant by issuing her a warrant dated 13 October 1986 for the payment. The complainant then deposited this warrant into her savings account at the Public Bank Bhd She then dutifully informed the appellant of this payment. On hearing this, the appellant requested her to hand over the EPF money to him so that he could distribute the same to all the beneficiaries after obtaining letters of administration of the estate of her late husband. Believing the appellant, the complainant then issued him a cheque for the above amount. The appellant should rightly have deposited this amount into the client's account but instead deposited it into his office account at the then United Asian Bank Bhd on 12 June 1987.

[6] According to the evidence of the operating officer of United Asian Bank Bhd, the appellant opened the client's account and the office account at the bank on 19 November 1986 and he made himself the sole signatory for both the accounts. According to the witness, from the time the two accounts were opened, the appellant made a number of withdrawals and deposits based on the statement of accounts. He added that on 19 May 1988, when the office account was closed by the bank for violating Bank Negara regulations by issuing bad cheques on at least three occasions within a period of six months, there was left in that account a meagre sum of RM401.02. As for the client's account which was also closed for the same reason on 27 May 1988, there was left also a meagre sum of RM39.69.

[7] The evidence disclosed that after both the above mentioned accounts were closed, the appellant on 28 November 1988 filed an application by way of a summons-in-chambers for a distribution order. This application came up before High Court Judge NH Chan (as he then was) who ordered some amendments to be made to exclude the appellant's firm as one of the beneficiaries. Thereupon the application was adjourned to another date. Following this, an amended application was indeed filed and the Court gave 26 October 1990 as the hearing date. Unfortunately, on that date, no one turned up and the Court struck out the application. No application for reinstatement or no fresh application was filed thereafter.



[8] In the meantime, the complainant and the other beneficiaries had still not been paid anything even after several enquiries made. Finally they lost their patience and appointed another firm of solicitors namely Messrs Lee, Pereira & Tan to take over. After several requests to hand over the relevant files to the new solicitors fell on deaf ears, the complainant was advised to lodge a police report which she did on 3 September 1991.

[9] By a letter dated 13 October 1991, the appellant's firm requested the complainant and her sister to call at their office. On 8 November 1991, she and the other beneficiaries presented themselves at the appellant's office where one clerk of the firm gave the following cheques:

- (a) a cheque dated 1 November 1991 for RM33,183.33 in the name of Ng Ju Hiang as trustee for Tee Yit Hong;
- (b) a cheque dated 1 November 1991 for RM2,500 in the name of Ng Ju Hiang as trustee for Tee Yit Hong;
- (c) a cheque dated 1 November 1991 for RM33,183.33 in the name of Ng Ju Hiang;
- (d) cheque dated 1 November 1991 for RM2,500 in the name of Ng Juey Hong.

[10] They were also given a statement of accounts with three indemnity receipts and an assurance that a cheque for Tee Shee Ping will be sent by post. Apart from the above, they were not paid anything else. There hardly appear to be any dispute of the facts as above presented. There was no dispute of the consent judgment, of the opening of the two accounts, of the receipt of the judgment sum from the insurance company, of depositing them into these two accounts and of the various withdrawals made from these two accounts and the fact that the accounts were closed by the bank with the meagre sums mentioned earlier remaining in the accounts and of the non-payment from the time of receipt of the money until the closure of the accounts. The main thrust of the argument on behalf of appellant appears to be solely on the admissibility of the evidence which tend to establish the act of misappropriation, of which I will avert to later.

[11] The Sessions Court Judge having been satisfied that a *prima facie* case had been out in accordance with the test as expounded by the Federal Court in *Khoo Hi Chiang v. PP* [1993] 1 MLRA 701; [1994] 1 MLJ 265; [1994] 2 CLJ 151; [1994] 1 AMR 323 called upon the appellant to enter his defence on both charges. The appellant elected to give a written statement from the dock and being a lawyer himself obviously understood the consequences thereof. Apart from his written statement, the appellant called no other witnesses and presented no other evidence.



[12] The gist of his statement seems to be that firstly, he as the solicitor for the complainant was entitled to keep the entire RM10,000 ordered as agreed costs. Secondly, as for the EPF money, the subject matter of the first charge was by mistake credited into his office account instead of the client's account. He also questioned the amount stated in the second charge as being erroneous. According to him, the sums mentioned in the consent judgment for him to distribute were only RM98,700 and RM8,000. Finally, he said that the reason why he did not make the payments was because he was waiting for the sealed copy of the distribution order from the Court.

[13] The Sessions Court Judge found that appellant's defence that he did not make the payments because he was waiting for the distribution order from the Court cannot be accepted since both the office and the client's accounts at the United Asian Bank Bhd had been closed before the appellant made the first application to the High Court for a distribution order. The Court found that misappropriation had occurred between the dates the various amounts were deposited in the accounts and the dates the accounts were closed. We have no reason to disagree with the Sessions Court Judge on this. When there is evidence that money entrusted to the appellant and deposited in a bank had been dissipated by him then the issue of him applying to the Court for a distribution order would not constitute any defence, as the money is no longer there to be distributed. We would add that it seems strange that he set up this defence since he did make a payment totalling RM71,366.66 even without any distribution order after the police report had been lodged. This line of defence cannot raise any doubt on the prosecution's case.

[14] At the hearing of the appeal, although several grounds were put forward learned Counsel Encik Shahul Hameed abandoned them and argued only on one ground which according to him would decide the fate of the whole case. The ground relied upon is on the admissibility of the evidence of the bank officer on the operation of the two accounts at the United Asian Bank Bhd and on the provisions of s 90A of the Evidence Act 1950.

[15] It is a fact that the prosecution relied on the evidence of the operations officer of the United Asian Bank Bhd (no was Bank of Commerce) one Zainal Abidin bin Mohamed who testified that in 1986 he was the operations officer at the Jalan Masjid India Branch of the United Asian Bank Bhd and in that capacity was in charge of the operations of current accounts of the bank. He confirmed that in 1986 the appellant's firm operated an office and also a client's account at the branch. He produced the relevant statements for both accounts as well as paying in slips, cancelled cheques and other relevant documents showing the opening and operation of these two accounts. It is also not disputed that the prosecution relied on the evidence of this officer to show movements of money from these two accounts from the time of their opening and their final closure to establish that money entrusted to the appellant had been appropriated for his personal use. He also testified and confirmed that the various statements he produced were computer printouts. He also confirmed



that the bank closed both the accounts for reasons stated earlier. It must be pointed out that the notes of evidence shows that cross examination of this particular witness was very short and only on the issue of his capacity and ability to identify signatures and nothing else. It is now the submission of learned Counsel for the appellant that the whole of the said evidence of this witness is totally hearsay and therefore inadmissible. The prosecution, of course, was relying on the provisions of the newly added s 90A of the Evidence Act 1950 which came into force on 16 July 1993 (by Act A851). This section is a special one concerned with the admissibility of documents produced by computers and of statements contained therein. This section reads:

90A(1) In any criminal or civil proceedings a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.

[16] While accepting this provision as enabling the prosecution to tender such document or statement, learned Counsel submitted that it could only be admitted under s 90A(1) if the prosecution not only proved that such document is produced by a computer but also that it is produced in the course of its ordinary use and in order to do this it is incumbent upon the prosecution to produce a 'certificate' signed by someone solely in charge of the computer which produced the printout as required by sub-section (2) of s 90A. This subsection provides:

(2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the Court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

[17] He further submitted that failure to produce this certificate is fatal and would render the statement of accounts inadmissible and the evidence of the bank officer hearsay. Therefore, he concluded that since such a certificate was not produced, there is no evidence whatsoever that the printout produced by the computer was in the course of its ordinary use.

[18] On reading through s 90A of the Evidence Act 1950, we are unable to agree with the construction placed by learned Counsel. First and foremost s 90A which has seven subsections should not be read disjointedly. They should be read together as they form one whole provision for the admissibility of documents produced by computers. As stated earlier, s 90A was added to the Evidence Act 1950 in 1993 in order to provide for admission of computer produced documents and statements as in this case. On our reading of this section, we find that under sub-section (1) the law allows the production of such computer generated documents or statements if there is evidence that they were produced firstly by a computer. Secondly, it is necessary also to



prove that the computer is in the course of its ordinary use. In our view, there are two ways of proving this. One way is, it 'may' be proved by the production of the certificate as required by sub-section (2). Thus sub-section (2) is permissive and not mandatory. This can also be seen in sub-section (4) which begins with the words 'Where a certificate is given under sub-section (2)...' These words show that a certificate is not required to be produced in every case. It is our view that once the prosecution adduces evidence through a bank officer that the document is produced by a computer it is not incumbent upon them to also produce a certificate under sub-section (2) as sub-section (6) provides that a document produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use. It is also our view that the prosecution can tender the computer printout through the investigating officer without calling any bank officer. Therefore, when they adopt this way of proof then it would be incumbent upon them to establish that the document is produced by a computer in the course of its ordinary use by producing the certificate under sub-section (2). The reason seems to me to be obvious as the investigating officer will be in no position to say that the printout is produced by a computer in the course of its ordinary use, as he is not an officer of the Bank.

[19] In the present case Zainal Abidin bin Mohamed the person in charge of the operations of current accounts testified that the statement of accounts were computer printouts. Therefore, in my view, the first part of sub-section (1) has been proved ie, that the document is a computer printout. It would be superfluous for him to issue a certificate under sub-section (2) when first hand evidence that 'the document so were produced by a computer' was given by Zainal Abidin. It would be superfluous to have a provision such as in sub-section (6) if in every case a certificate must be produced. It follows, therefore, that such a certificate need only be tendered if an officer like Zainal Abidin is not called to testify that the statement is produced by a computer. Then the certificate becomes relevant to establish that the document is produced by a computer in the course of its ordinary use. It is my view that when such an officer is not called, the court cannot rely on the deeming provision of sub-section (6). Once the court accepts the evidence of Zainal Abidin, and in this case I cannot see any reason whatsoever for the court not to, as there was no challenge by cross-examination, the prosecution has succeeded in proving what s 90A(1) requires them to prove, that such document was produced by the computer and in view of the deeming provisions of sub-section (6), the second part is also proved.

[20] Since the appellant relied solely on this one ground we, find no merits in the argument of learned Counsel for the appellant that the Court should reject the whole of the evidence of Zainal Abidin. We find more than ample evidence of misappropriation and the appellant was rightly convicted. Before leaving this appeal there is one other aspect of this case which we dealt with ie, the order which the High Court made on its own volition in ordering the appellant to pay RM10,000 costs in default of which he was to be imprisoned for a



further 12 months. Unfortunately, the learned Judge has not mentioned under which provision of the law he purportedly made this order, nor did he mention to whom should these costs be paid. In the light of s 322(3) of the Criminal Procedure Code, it is our view that this additional order is not justified, and we therefore set it aside.

[21] For the above reasons, we would therefore dismiss this appeal.

Mahadev Shankar JCA:

[22] I have read the judgment of my brother Shaik Daud bin Haji Mohd Ismail JCA with which I am in complete agreement. We were unanimous in our decision to dismiss this appeal. Nevertheless since the learned Deputy Public Prosecutor has specifically requested us for guidance on how s 90A of the Evidence Act 1950 ('the Act') should be applied, I wish to add a few words of my own on this aspect of the case.

[23] The evidence relating to the entire history of the operations of the accused's bank accounts with the Bank of Commerce ('the bank') was given by PW10 Encik Zainal Abidin bin Mohamed ('Zainal'). When he testified on 18 August 1993 he was an executive officer at the Bank's Head Office in Jalan Tun Perak. The offences charged were alleged to have occurred between 12 June 1987 and 27 May 1988 ('the relevant period') and took place in the Bank's branch office at Jalan Masjid India ('the branch').

[24] Zainal's evidence-in-chief so far as is relevant to this aspect of the case was as follows. From 1986 he was the officer in charge of all the branch operations including the conduct of current accounts. In other words, to use the relevant words from s 90A(2) of the Act he was the person who was responsible "for the conduct of the activities for which the ('branch') computer was used," during the relevant period.

[25] On 19 November 1986 the accused opened a current account in the branch. Although Zainal did not personally handle this transaction, he was the branch officer responsible for verifying the accused's signature on all documents throughout the accused's relationship with the branch and was very familiar with the accused's signature. The opening form produced (Pxh p 41) was the original. It contained the accused's particulars, and his signature. It was designated "client's account". The computerised entry on this document gave details of the bank's code, the account number and the date. These were identified by Zainal.

[26] The RM133,000 which was the subject matter of the second charge was paid into this account in four instalments of RM33,250 each on 22 September 1987, 19 October 1987, 18 November 1987 and 27 November 1987. The original paying-in-slips for each of these payments were produced. Each of these contained a computerised entry confirming that the branch had received these amounts. Photocopies of the cheques in favour of the accused were also produced which matched the pay-in-slips.



[27] Zainal also produced the branch office copies of the monthly statements of this client's account from the day it was opened on 19 November 1986 up to the date it was closed on 27 May 1988 because three of the accused's cheques were dishonoured within six months. The monthly statements were generated by the branch computer. The closing balance was RM39.69. The four instalments aforesaid were reflected in the credit columns of these monthly statements against the dates on the paying-in slips.

[28] After dealing systematically with each paying-in slip, the relevant cheque and the corresponding credit entry in the monthly statement, Zainal produced the cheques which the accused had drawn on this client's account. There were 51 transactions 44 cheques were originals. Four had been "referred to drawer". Three had been lost in the course of the bank's renovation. Zainal personally identified the accused's signature on all the cheques produced.

[29] With reference to the RM6,576.16 in the first charge Zainal testified that the accused had opened an office account with the branch on 19 November 1986. As with the client's account, Zainal produced the original account opening form with the accused's signature, and 14 computer generated monthly statements (ie, the office copies) from 28 May 1987 up to 19 May 1988 when the account was also closed because three cheques were dishonoured within six months. The significance of these dates is that instead of paying the RM6,576.16 into his client's account as he was bound in law to do, the accused paid the money into his office account on 12 June 1987. The original paying-in slip was produced with the computer entry confirming receipt (Pxx P51). The complainant had earlier identified the Public Bank cheque for this amount which he handed to the accused. Zainal also produced 135 cheques which the accused had drawn on this account leaving a closing balance of RM401.02. All the cheques matched the entries in the monthly statements.

[30] Zainal was not challenged by defence Counsel on the accuracy of the entries in the documents produced. It was only on appeal that a point was raised that because a certificate was not produced under s 90A(2) the prosecution had failed to prove its case.

[31] The fallacy of this submission is easily demonstrated. Zainal was the branch officer in charge of all the operations of the branch. He was therefore responsible for the conduct of the activities of the branch for which that computer was used. If he chose he could have issued a certificate as required by s 90A(2) and without his actual presence all the computer generated documents would have been admitted in evidence as provided by s 90A(1). The *viva voce* evidence of the man in the witness box counts for more than a certificate issued by him.

[32] There is a parallel here with "Consents to Prosecute" which are required under the Prevention of Corruption Act 1950. If a Deputy Public Prosecutor is present and goes on record when the accused is called upon to plead to an offence under this Act, no separate consent should be required. See *Lyn Hon*



Yap v. Public Prosecutor [1953] 1 MLRA 392; [1956] MLJ 226, and *Perumal v. Public Prosecutor* [1970] 1 MLRA 25; [1970] 2 MLJ 265.

[33] We need to remind ourselves that s 90A was enacted to bring the “best evidence rule” up to date with the realities of the electronic age. Receipts for payments in and records of payments out of a bank account are keyed in by the tellers into the terminals at the counter, and the information is electronically stored in the bank’s computer. The information so stored is not in itself visible to the naked eye. To become visible the raw data has to be projected on a video display unit and/or printout. So the definition of a “document” in s 3 of the Evidence Act now provides that both the display on the video display unit, and the printout qualify as documents. The last two items in the Illustrations to the section have spelt this out.

[34] The effect of s 90A(1) in the present scenario is that it is no longer necessary to call the actual teller or bank clerk who keyed in the data to come to Court provided he did so in the course of the ordinary use of the computer.

[35] This is a relaxation of the direct evidence rule in s 60 of the Act beyond the extent to which its provisions have been diluted by s 32(b) in the case of documents made in the ordinary course of business. A situation could thus arise under s 90A(1) where the particular person who keyed in the information may not be individually identifiable, but the document would nevertheless be admissible.

[36] Zainal gave evidence that the office copies of the monthly statements and the various other documents tendered by him had been handed to the police when the investigations were under way. Ordinarily, a document would only be admissible as evidence of the facts it contains if the record and the event recorded are contemporaneous. Section 90A(6) relaxes this requirement also. The contemporaneous document here is the data keyed in at the time of the transaction. The printout is only a process of retrieval. By s 90A(6) this retrieval can come after investigation or even after the trial has begun.

[37] It is not necessary for me to say anything here about the far reaching effects of s 90B and 90C of the Act. The accused did not dispute that he received the moneys which were the subject of the charges, that they were paid into these accounts and that he failed to pay them over to his clients despite numerous demands.

[38] The charges against the accused were conclusively proved. In the case of the first charge, the conversion took place as soon as the cheque was paid into the accused’s office account because in effect he put the money into his own pocket. As for the second charge, even if the accused had a good reason for delaying payment (and in my view he had none), conversion was conclusively proved when the total amount in the client’s account shrank below the total amount due to the complainants.



[39] When the second instalment of RM33,250 was paid in on 19 October 1987, the total credit balance was RM157,258.79, of which RM66,500 belonged to the complainants. On 17 November 1987, the total credit balance had shrunk to RM5,246.79. The only inference from this is that out of the complainants' RM66,500, the accused had converted to his own use RM61,253.21 by that day. The third and fourth instalments were paid in on 18 November and 27 November 1987. On this day the total credit balance after these payments was RM68,496.79. It should have been at least RM133,000 on the assumption that the complainants were the only clients left whose money had not yet been paid out of this account. Thereafter the total credit balance progressively shrank to RM39.69. The only inference is that since 17 November 1987 the accused dissipated the third and fourth instalments also.

[40] We must now deal in depth with another submission advanced by Encik Shahul Hameed on behalf of the accused because if this submission represents the thinking of even a small segment of the legal profession, it must be corrected immediately.

[41] The submission originated from the concept that once the complainants' money was paid into the accused's client's account, it lost its individual identity, and merged with the total balance in the client's account. Since a solicitor could maintain more than one client's account in one or more banks it was submitted that even if the amount in the Bank of Commerce client's account was not enough to meet his liabilities to the complainants, the accused would have not committed any offence if there were enough moneys in these other accounts which the accused could have used to pay the complainants. There was no evidence that any such other accounts ever existed. Nevertheless, it was contended that since the prosecution had not shown that the accused did not have client's accounts other than the one in the Bank of Commerce and that these other accounts did not contain funds in excess of the subject matter of the charges the prosecution had failed to prove its case.

[42] My first response to this is that the prosecution cannot be expected to prove a negative. All it needed to show was that the complainants' moneys had been paid into a particular account and that those moneys had been converted. The contention that there was another client's account where other moneys were being kept in reserve to meet this liability goes to defence and s 106 of the Evidence Act applies. That burden is on the accused because it is a fact specially within his knowledge. The cases are all listed in the *Consolidated Subject Index of the Malaysian Law Journal 1932-1991* at pp 551-552.

[43] Would it have helped the accused if he had led evidence to show that he had other client's accounts where individually or cumulatively the credit balances therein had exceeded RM133,000? The accused and Encik Shahul Hameed obviously thought so. It has therefore become necessary to disabuse both of them and anybody else who holds this view that this emphatically NOT so.



[44] Whilst the Solicitors' Account Rules 1978 r 3(2) permits a solicitor to maintain more than one client's account, r 7(a)(i) only permits the withdrawal of a client's money "for a payment to or on behalf of the client."

[45] The complainants' money (RM133,000) was paid into the Bank of Commerce client's account. The effect of r 7(a)(i) is that this money could only be taken out to pay the complainants or to their order. To use one client's money to settle a solicitor's liability to some other client is a criminal offence. A client's account in bank A is impressed with a trust only for all those individual clients whose moneys have been deposited there (say X, Y and Z). Another client's account in bank B may contain the moneys of clients L, M and N. A solicitor who removes moneys from bank B in this example to pay a client in complainant's bank A does so at his peril.

[46] In conclusion, I would observe that the accused abused the trust reposed on him and got what he richly deserved. What we urgently need to do is to inquire why the existing sanctions have failed to deter this kind of miscreant and whether more aggressive measures should be instituted.

Abdul Malek Ahmad J:

[47] I have read the judgments of my learned brothers Shaik Daud JCA and Mahadev Shankar JCA and agree with the reasoning expressed therein. The whole appeal rested on the construction of s 90A of the Evidence Act 1950 and whether one applies logic and common sense or the basic rules of legislative interpretation, the finding of my learned brother Judges appears to be the only conclusion that can be reached as regards the effect of the said section. The appeal is accordingly dismissed.



PP
v.
JASENDRAN SANMUGAM

High Court Malaya, Kuala Lumpur
Collin Lawrence Sequerah J
[Criminal Case No: WA-45B-27-03/2018]
24 August 2020

Case(s) referred to:

Chan Chwen Kong v. PP [1962] 1 MLRA 32; [1962] 1 MLJ 307 (refd)
Chang Kim Siong v. PP [1967] 1 MLRA 123; [1968] 1 MLJ 36 (refd)
Jayaraman Velayuthan & Ors v. PP [1982] 1 MLRA 20; [1982] 2 MLJ 306; [1982] CLJ (Rep) 130 (refd)
Karam Singh v. PP [1967] 1 MLRA 416; [1967] 2 MLJ 25 (refd)
PP v. Magendran Mohan [2005] 1 MLRH 567; [2005] 6 MLJ 6; [2005] 3 CLJ 592 (refd)
Abdullah Zawawi v. PP [1985] 1 MLRA 103; [1985] 2 MLJ 16; [1985] CLJ (Rep) 19 (refd)
Ahmad Najib Aris v. PP [2009] 1 MLRA 58; [2009] 2 MLJ 613; [2009] 2 CLJ 800 (refd)
Balachandran v. PP [2004] 2 MLRA 547; [2005] 2 MLJ 301; [2005] 1 CLJ 85; [2005] 1 AMR 321 (refd)
Hanafi Mat Hassan v. PP [2006] 1 MLRA 706; [2006] 4 MLJ 134; [2006] 3 CLJ 269; [2006] 4 AMR 281 (refd)
Looi Kow Chai & Anor v. PP [2002] 2 MLRA 383; [2003] 2 MLJ 65; [2003] 1 CLJ 734; [2003] 2 AMR 89 (refd)
Mohd Fazli Azri Jamil v. PP [2014] 3 MLRA 108 (refd)
Munusamy Vengadasalam v. PP [1986] 1 MLRA 292; [1987] 1 MLJ 492; [1987] CLJ (Rep) 221 (refd)
Poh Weng Nam v. PP [2013] 5 MLRA 75; [2013] 4 CLJ 1096 (refd)
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 1 MLRH 59; [1999] 2 MLJ 1; [1999] 2 CLJ 215; [1999] 2 AMR 2017 (refd)
PP v. Hanif Basree Abdul Rahim [2004] 1 MLRH 375; [2004] 3 MLJ 271; [2004] 3 CLJ 700; [2004] 5 AMR 204 (refd)
PP v. Mohd Radzi Abu Bakar [2005] 2 MLRA 590; [2005] 6 MLJ 393; [2006] 1 CLJ 457; [2005] 6 AMR 203 (refd)
PP v. Azilah Hadri & Anor [2015] 1 MLRA 431; [2015] 1 MLJ 617; [2015] 1 CLJ 579; [2015] 1 AMR 641 (refd)
PP v. Lee Chor Hean [2018] MLRHU 1665 (refd)
PP v. Megat Sharizat Megat Shahrur [2012] 2 MLRA 710; [2011] 1 MLRA 332; [2013] 3 MLJ 227; [2011] 8 CLJ 893; [2012] 2 AMR 105 (refd)
PP v. Thenagaran Murugan [2013] 3 MLRA 664; [2013] 3 MLJ 328; [2013] 4 CLJ 364; [2013] 3 AMR 105 (refd)
Rakesh Kumar Thangagrajoo lwn. PP & Kes Lain [2017] MLRAU 380 (refd)
Sainal Abidin Mading v. PP [1999] 1 MLRA 459; [1999] 4 MLJ 497; [1999] 4 CLJ



215; [1999] 4 AMR 4277 (refd)
Sunny Ang v. PP [1965] 1 MLRA 38; [1966] 2 MLJ 195 (refd)
Tham Kai Yau & Ors v. PP [1976] 1 MLRA 279; [1977] 1 MLJ 174 (refd)
Yii Soon Ho v. PP [2014] 5 MLRA 249; [2014] 5 MLJ 547 (refd)

Legislation referred to:

Criminal Procedure Code, s 180(1), (2)
Evidence Act 1950, ss 3, 90A, 114(g)
Penal Code, ss 299, 300, 302

Counsel:

For the prosecution: Mohd Radzi Abdul Razak (together with Joy Jothi Nadrarasan and Annur Atiqah); Attorney General's Chambers
For the respondent: Y.Bhg Datuk R.S. Sodhi (together with Sukhdev Singh); M/s Sukhdev & Co

[Acquit the Accused of the charge against him without calling him to answer on his defence.]

JUDGMENT**Collin Lawrence Sequerah J:****A) Introduction**

[1] The Accused was charged with the following:

"Bahawa kamu pada 30 November 2017, jam lebih kurang 11.13 malam hingga 11.42 malam bertempat di rumah no D-19-2 Sri Putramas Condo 1, Jalan Putramas, dalam dearah Sentul, dalam Wilayah Persekutuan, telah melakukan bunuh dengan menyebabkan kematian terhadap Manommani a/p Rajanayagam No Kad Pengenalan 900211-14-5562 dan oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan."

B) Prosecution Case

[2] The salient facts as unravelled by the prosecution is that on 30 November 2017 at around 11.52 pm., Mohd Aseri (RF116137), PW1, who was on duty at the Control Centre "Pusat Kawalan", Ibu Pejabat Polis Sentul ("IPD") received information from Sharmila Subramaniam, a 999 operator, who herself had received a call from a person named Zubir ("PW5") that someone had fallen down from the building at Block D, Putramas Condo 1, Jalan Kuching, Kuala Lumpur.

[3] PW1 then instructed members from the IPD to proceed to the said building premises while relaying the information that a lady of Indian ethnicity was found lying down at the base of Block D of the said Condo and was deceased.



[4] From the information made available to PW1, the deceased had fallen down from the 19th floor of the Condo and was identified as Manomani a/p Rajayanagam.

[5] PW2 confirmed that on 1 December 2017 at around 1.00am., he accompanied ASP Azrizal (PW15) to the said Condo in order to take some photographs (P5 1-42).

[6] PW5, Zubir bin Saidin, was a security guard at the Condo and said that on 30 November 2017 at around 11.45pm., while he was on patrol duty at the parking area at Block E of the said Condo, he heard screams from people that someone had fallen down. PW5 then placed a 999 emergency call and after about 10 minutes a team of police turned up at the Condo.

[7] PW5 then accompanied by the police team went to each unit in Block D of the Condo until they arrived at Unit D-19-2 where they discovered the door to the unit opened along with the glass sliding door on the balcony. PW5 said that he could view the condition of the unit inside through the opened door.

[8] PW10 said that on 1 December 2017 at around 3.00am., he went to the place where the deceased was found ("scene") and recovered several exhibits for the purpose of forensic analysis (exhibits P16 to P23A). All the exhibits were then sent to PW15 on the same date.

[9] PW13 arrested the Accused on 1 December 2017 at around 6.00am. in front of Restaurant Al- Sarifa at Jalan 4/109F, Taman Danau Desa, Taman Desa, Off Old Klang Road, KL.

[10] PW3, who is the mother of the deceased's husband, said that the deceased previously lived in her house but on 25 December 2016 had left the house after having a disagreement with her husband. PW3 said that the deceased had later called her to apologise and said that she wanted to return to her house.

[11] PW6, Thirunavukarasar a/l Ramu, is the husband of the deceased and said that while the deceased was ward for an illness at the Gleneagles Hospital on 15 November 2017, the deceased told him that she was having a relationship with a male by the name of "Jasen" and that this person had previously beaten her while drunk and threatened to kill her if she were to reconcile with him ie PW6.

[12] PW6 further said that he received several whatsapp messages on his mobile phone on 30 November 2017 from around 11.10pm. until 11.12pm as follows:

"Call me

Urgebt6

Pls



Very Urgenet

Help me

He's here

Help me"

[13] PW6 said that these messages were from the deceased but he only read them on 1 December 2017 at around 1.05am., as he was playing futsal from around 11.00 pm until 1.00am the following day. PW6 tried to call and message the deceased after that but to no avail.

[14] PW8 who also had stayed previously with the deceased at the said unit, testified that the Accused had previously lived in the same house as the deceased and that the deceased was not the sort of person who would take her own life. PW8 further said that the deceased had previously told her to talk to the Accused to ask him to stop disturbing her.

[15] PW14 testified that there was the DNA of the Accused found on a cigarette butt (P16 (a)) recovered from the deceased's house.

[16] PW12, Dr Mohd Shah Bin Mahmood, who performed the post mortem on the deceased testified that the cause of death was due to "Multiple injuries consistent with fall from height".

[17] The Post Mortem Report tendered and marked as (P28) confirmed the cause of death to be due to "Multiple injuries consistent with fall from height".

C) Duty Of Court At The End Of Prosecution Case

[18] The duty of the court at the end of the prosecution case is set out in s 180(1) of the Criminal Procedure Code (CPC) which stipulates that when the case for the prosecution is concluded the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.

[19] The cases of *PP v. Dato' Seri Anwar Ibrahim (No 3)* [1999] 1 MLRH 59; [1999] 2 MLJ 1; [1999] 2 CLJ 215; [1999] 2 AMR 2017, *Looi Kow Chai & Anor v. PP* [2002] 2 MLRA 383; [2003] 2 MLJ 65; [2003] 1 CLJ 734; [2003] 2 AMR 89, *Balachandran v. PP* [2004] 2 MLRA 547; [2005] 2 MLJ 301; [2005] 1 CLJ 85; [2005] 1 AMR 321 and *PP v. Mohd Radzi Bin Abu Bakar* [2005] 2 MLRA 590; [2005] 6 MLJ 393; [2006] 1 CLJ 457; [2005] 6 AMR 203 respectively lay down the proposition that at the end of the case for the prosecution, their evidence must be subject to maximum evaluation in order to determine whether a *prima facie* case is made out.

[20] In *Looi Kow Chai v. Public Prosecutor (supra)*, the Court of Appeal held:

"It therefore follows that there is only one exercise that a judge sitting



alone under s 180 of the CPC has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no *prima facie* case has been made out and the accused would be entitled to an acquittal".

D) Analysis Of The Prosecution Case

[21] Section 302 prescribes the punishment for whoever commits murder. The offence of murder itself is defined in s 300 of the Penal Code.

The Difference Between Culpable Homicide And Murder

[22] In evaluating whether the prosecution has successfully made out a *prima facie* case against the accused for murder under s 302, it is important to first distinguish between the offence of culpable homicide under s 299 and murder under s 300.

[23] This is because all murder is culpable homicide but not all culpable homicide is necessarily murder. It is therefore imperative for the court to appreciate the fine but discernible difference between the two in order to make the correct finding as to whether or not the evidence disclosed reflects the offence of culpable homicide not amounting to murder or culpable homicide amounting to murder.

[24] Section 299 of the Penal Code defines the offence of culpable homicide as follows:

"Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

[25] Section 300 of the Penal Code describes murder in the following terms:

"Except in the cases hereinafter excepted culpable homicide is murder:

- a) If the act by which the death is caused is done with the intention of causing death;
- b) If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
- c) If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or



d) If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid."

[26] Section 300 goes on to set out a number of exceptions which operate to reduce murder to culpable homicide not amounting to murder. These exceptions are provocation, exceeding private defence, exceeding the powers of a public servant, sudden fight and consent.

[27] From a perusal of both ss 299 and 300, it is clear that some cases of culpable homicide will amount to murder while some will be classified as culpable homicide not amounting to murder.

[28] Because of the similarity in wording, the distinction between the two is so fine as to be almost indiscernible. This court is therefore grateful for the assistance of high authority that has emanated from one of the most distinguished legal minds in this country.

[29] In the case of *Tham Kai Yau & Ors v. PP* [1976] 1 MLRA 279; [1977] 1 MLJ 174, Raja Azlan Shah J (as His Royal Highness was then) held as follows:

"...A comparison that frequently arises in the application of ss 299 and 300 is the tenuous contention that s 299 is not a substantive offence and therefore is either murder or culpable homicide according to whether or not one of the exceptions to s 300 apply, and if by reason of the absence of the necessary degree of *mens rea* an offence does not fall within s 300, it cannot be one of culpable homicide not amounting to murder....but would amount to causing grievous hurt. In our view, the correct approach to the application of the two sections is this. **Section 299 clearly defines the offence of culpable homicide. Culpable homicide may not amount to murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to s 300, Penal Code apply, and (b) where the necessary degree of *mens rea* specified in s 299 is present, but not the special degrees of *mens rea* referred to in s 300, Penal Code.** We would like in this connection to express the need to bear in mind that all cases falling under s 300 Penal Code must necessarily fall within s 299, but all cases falling within s 299 do not necessarily fall under s 300...."

[Emphasis Added]

[30] The case of *PP v. Megat Sharizat Megat Shahrur* [2012] 2 MLRA 710; [2011] 1 MLRA 332; [2013] 3 MLJ 227; [2011] 8 CLJ 893; [2012] 2 AMR 105 echoed and quoted verbatim the relevant excerpts in *Tham Kai Yau (supra)* and added:



"The first part of s 304, Penal Code covers cases which by reason of the exceptions are taken out of the purview of s 300, clauses (1), (2) and (3) but otherwise would fall within it and also cases which fall within the second part of s 299, but not within s 300, clauses (2) and (3). The second part of s 304, Penal Code covers cases falling within the third part of s 299 not falling within s 300, clause (4).

Thus, if death is an imminent result, it falls under s 300. If on the other hand, that death is a likely result, it falls under s 299. It would be safe to conclude that all cases under s 300 would fall under s 299 as well, but this is not necessarily so *vice versa*. "

[Emphasis Added]

[31] See also *Poh Weng Nam v. Public Prosecutor* [2013] 5 MLRA 75; [2013] 4 CLJ 1096, *Public Prosecutor v. Thenagaran Murugan And Another Appeal* [2013] 3 MLRA 664; [2013] 3 MLJ 328; [2013] 4 CLJ 364; [2013] 3 AMR 105 and *Mohd Fazli Azri Jamil v. Public Prosecutor* [2014] 3 MLRA 108 which espouses the same principles.

[32] Having said all of this, the distinction between s 299 and that under s 300 of the Penal Code are defined in very similar terms so as to render it fraught with practical difficulties in deciding whether a case falls under s 299 or 300 including which of the limbs are applicable.

[33] From a distillation of the abovementioned authorities however, the position appears to be as follows. The difference between s 299 and s 300 lies in the degree of probability or likelihood that death would result from a particular act ie the degree of risk to human life. If death is a likely result of the act, it is culpable homicide, if it is the most probable result, it is murder. If death is imminent, it is also murder.

[34] Culpable homicide may not amount to murder where the evidence is sufficient to constitute murder, but one or more of the exceptions to s 300 apply, for example provocation, right of private defence and sudden fight and where the necessary degree of *mens rea* in s 299 is present but not the special degrees of *mens rea* referred to in s 300 of the Penal Code.

[35] In order for the prosecution to establish a case of murder under s 300, they must first prove the following ingredients.

The Necessary Ingredients To Be Proven In A Charge Of Murder Under Section 302 Penal Code

[36] The necessary ingredients that must be proven by the prosecution in a charge of murder was set out in the Court of Appeal case of *Sainal Abidin bin Mading v. PP* [1999] 1 MLRA 459; [1999] 4 MLJ 497; [1999] 4 CLJ 215; [1999] 4 AMR 4277, and in the context of that case were expressed to be as follows:



"The ingredients are:

- [1] That Isnidil bin Rasin is dead;
- [2] That Isnidil bin Rasin died as a result of injuries sustained by him;
- [3] That the injuries of Isnidil bin Rasin were caused or the result of the act of the appellant;
- [4] That in inflicting the injuries upon Isnidil bin Rasin, the appellant either:
 - (a) caused them with the intention of causing death; or
 - b) caused them with the intention of causing such bodily injuries as the appellant knew to be likely to cause the death; or
 - c) caused them with the intention of causing bodily injuries and such bodily injuries were sufficient in the ordinary course of nature to cause death."

i) The Deceased Manommani A/P Rajanayagam Is Dead

[37] This ingredient, which is not in dispute, was satisfied by the evidence of PW12, Dr Mohd Shah Bin Mahmood, who performed the post mortem on the deceased. There was also no dispute with regard to this ingredient.

ii) The Deceased Died As A Result Of Injuries Sustained By Her

[38] Again, this ingredient was satisfied by the testimony of PW12 who said that there were both internal and external injuries sustained by the deceased. The internal injuries were occasioned to the back of the head, the mouth and neck as well as to the chest, abdomen and skeletal frame.

[39] PW12 said that the cause of death was due to "Multiple injuries consistent with fall from height". PW12 also confirmed that the injuries were sufficient in the ordinary course of nature to cause death.

iii) The Injuries To The Deceased Were Caused Or The Result Of The Act Of The Accused And That In Inflicting The Injuries The Accused Had The Necessary Intention Prescribed In Either Of Limbs (a) To (c) Or Possessed With The Knowledge Necessary In Limb (d) Of Section 300 Penal Code

[40] The third and fourth ingredients of the offence of murder under s 300 of the Penal Code can be dealt with together for the purposes of analysis.

[41] The main thrust of the prosecution case rested upon the fact that the



Accused was the last known person to be seen with the deceased before she met her untimely death, the evidence of the prosecution as a whole being circumstantial in nature.

Last Seen Together Concept

[42] The prosecution submitted that according to the "last seen together" principle, and because the circumstances show that the deceased was last seen alive with the Accused, this was sufficient to implicate and connect the Accused to the crime.

[43] The recent Court of Appeal case of *Rakesh Kumar Thangagrajoo lwn. PP & Kes Lain* [2017] MLRAU 380 discussed the said concept and held the following:

"Kami juga bersetuju dengan penghujahan Timbalan Pendakwa Raya berkenaan dengan pemakaian konsep "last seen together" seperti mana diputuskan dalam kes *Ashok v. State of Maharashtra* [2015] 4 Supreme Court 393. Dalam kes ini, Mahkamah Agung di India telah memutuskan seperti yang berikut:

The "last seen together" theory has been elucidated by this Court in *Trimukh Marotiu Kirkan v. State of Maharashtra*, [2006] 10 SCC 106, in the following words:

Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. Thus, **the doctrine of last seen together shifts the burden of proof on the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him.**

In *Ram Gulab Chaudhary v. State of Bihar*, [2001] 8 SCC 311, the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor his body was found. The accused, however, offered no explanation as to what they did after they took away the boy. It was held that for absence of any explanation from the side of the accused about the boy, there was every justification for drawing an inference that they had murdered the boy.

In *Nika Ram v. State of H.P.*, [1972] 2 SCC 80, it was observed that the fact that the accused alone was with his wife in the house when she



was murdered with a "Khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt.

The latest judgment on the point is *Kanhaiya Lal v. State of Rajasthan*, [2014] 4 SCC 715. In this case this Court has held that **the circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing the connectivity between the accused and the crime.** Mere non-explanation on the part of the accused by itself cannot lead to the proof of guilt against the accused.

From the study of above stated judgments and many others delivered by this Court over a period of years, the rule can be summarised as that the initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per s 106 of Indian Evidence Act. **Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused etc., non-explanation of death of the deceased, may lead to a presumption of guilt. "**

[Emphasis Added]

[44] The above authority which referred to several Indian decisions on the "last seen together" theory, neatly and succinctly states that where an accused is last seen with the deceased, in the absence of any plausible explanation by the accused, it can lead to a presumption of guilt although this is not necessarily conclusive.

CCTV Recording

[45] In order to place reliance on the "last seen together" theory, the prosecution attempted to adduce evidence through tendering of a closed circuit television ("CCTV") recording allegedly showing the Accused hurriedly leaving the block of flats in a motor vehicle.

[46] This was done with the objective of obviously proving his presence at the scene that day and his complicity in the offence charged along with the fact that the deceased was last seen alive with him.

[47] This attempt was roundly objected to by the defence as the maker of the said CCTV recording was not called as a witness. As a consequence, the said recording was not marked as an exhibit except only for identification purposes (ID 12 & 13).



[48] Pursuant to s 3 of the Evidence Act 1950 ("EA"), the CCTV recording would come under the fairly wide definition of a "document" as follows:

"document" means any matter expressed, described, or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, sound track or other device whatsoever, by means of:

- (a) letters, figures, marks, symbols, signals, signs, or other forms of expression, description, or representation whatsoever;
- (b) any visual recording (whether of still or moving images);
- (c) any sound recording, or any electronic, magnetic, mechanical or other recording whatsoever and howsoever made, or any sounds, electronic impulses, or other data whatsoever;
- (d) recording, or transmission, over a distance of any matter by any, or any combination, of the means mentioned in paragraph (a), (b) or (c),

or by more than one of the means mentioned in paragraphs (a), (b), (c) and (d), intended to be used or which may be used for the purpose of expressing, describing, or howsoever representing, that matter;

The CCTV would also fall under the definition of "computer" under s 3 EA as follows:

"computer" means an electronic, magnetic, optical, electrochemical, or other data processing device, or a group of such interconnected or related devices, performing logical, arithmetic, storage and display functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device or group of such interconnected or related devices, but does not include an automated typewriter or typesetter, or a portable hand held calculator or other similar device which is non-programmable or which does not contain any data storage facility;

[49] The admissibility of such CCTV recording therefore would be governed by s 90A of the EA which reads:

s 90A. Admissibility of documents produced by computers, and of statements contained therein

- (1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the



document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.

(2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

(3) (a) It shall be sufficient, in a certificate given under subsection (2), for a matter to be stated to the best of the knowledge and belief of the person stating it.

(b) A certificate given under subsection (2) shall be admissible in evidence as *prima facie* proof of all matters stated in it without proof of signature of the person who gave the certificate.

(4) Where a certificate is given under subsection (2), it shall be presumed that the computer referred to in the certificate was in good working order and was operating properly in all respects throughout the material part of the period during which the document was produced.

(5) A document shall be deemed to have been produced by a computer whether it was produced by it directly or by means of any appropriate equipment, and whether or not there was any direct or indirect human intervention.

(6) A document produced by a computer, or a statement contained in such document, shall be admissible in evidence whether or not it was produced by the computer after the commencement of the criminal or civil proceeding or after the commencement of any investigation or inquiry in relation to the criminal or civil proceeding or such investigation or inquiry, and any document so produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

(7) Notwithstanding anything contained in this section, a document produced by a computer, or a statement contained in such document, shall not be admissible in evidence in any criminal proceeding, where it is given in evidence by or on behalf of the person who is charged with an offence in such proceeding the person so charged with the offence being a person who was:



(a) responsible for the management of the operation of that computer or for the conduct of the activities for which that computer was used; or

(b) in any manner or to any extent involved, directly or indirectly, in the production of the document by the computer.

[50] As can be appreciated, certain pre-conditions are essential and must be complied with before any such CCTV recording can be admitted in evidence.

[51] In this case, the person responsible for the management or operation of the CCTV recording apparatus was not called and neither was a certificate tendered. As such none of the conditions in s 90A of the EA were fulfilled.

[52] In *Hanafi bin Mat Hassan v. Public Prosecutor* [2006] 1 MLRA 706; [2006] 4 MLJ 134; [2006] 3 CLJ 269; [2006] 4 AMR 281, the Court of Appeal speaking through Augustine Paul JCA (later FCJ) held as follows:

"[21] In the case of *Gnanasegaran a/l Pararajasingam v. Public Prosecutor* [1995] 2 MLRA 555; [1997] 3 MLJ 1; [1997] 4 CLJ 6; [1997] 3 AMR 2841, learned counsel submitted that the computer produced document could only be admitted under s 90A if the prosecution proved not only that it was produced by a computer but also that it was produced in the course of its ordinary use and that in order to do so it was incumbent upon the prosecution to produce a certificate signed by someone solely in charge of the computer which produced the printout as required by s 90A(2). He further submitted that a failure to produce the certificate was fatal and would render the document inadmissible. Shaik Daud JCA in writing for the Court of Appeal did not agree with the submission of learned counsel.

His Lordship proceeded to hold that **a document produced by a computer is admissible under s 90A(1) if it was produced by a computer and that it was produced by the computer in the course of its ordinary use. With regard to the need to tender in evidence the certificate it was held that since s 90A uses the word 'may' a certificate need not be produced in every case.** In commenting on the circumstances when the certificate must be tendered in evidence Shaik Daud JCA said (at p 11):

It is our view that once the prosecution adduces evidence through a bank officer that the document is produced by a computer, it is not incumbent upon them to also produce a certificate under sub-section (2) as sub-section (6) provides that a document produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use. It would be superfluous to have a provision such as in sub-section (6) if in every case a certificate must be produced.



It follows, therefore, that such a certificate need only be tendered if an officer like Zainal is not called to testify that the statement is produced by a computer. Then the certificate becomes relevant to establish that the document is produced by a computer in the course of its ordinary use. It is our view that when such an officer is not called, the court cannot rely on the deeming provision of sub-section (6).

[22] It is implicit in the judgment of Shaik Daud JCA that what is required to be proved in order to render a document admissible under s 90A are only that it was produced by a computer and that it was produced by the computer in the course of its ordinary use. It was held that these matters could be proved by the tendering of oral evidence to show that the document was produced by a computer thereby activating the presumption in s 90A(6) to show that the document was produced by the computer in the ordinary course of its use or, alternatively, by the production of a certificate to establish the same presumed fact. In other words s 90A(6) has been construed only as an alternative mode of proof to the use of a certificate.

[23] A careful perusal of s 90A(1) reveals that in order for a document produced by a computer to be admitted in evidence it must have been produced by the computer in the course of its ordinary use. It is therefore a condition precedent to be established before such a document can be admitted in evidence under s 90A(1). The manner of establishing this condition has been prescribed. It can be proved by tendering in evidence a certificate as stipulated by s 90A(2) read with s 90A(3). Once the certificate is tendered in evidence the presumption contained in s 90A(4) is activated to establish that the computer referred to in the certificate was in good working order and was operating properly in all respects throughout the material part of the period during which the document was produced. Section 90A(4) must therefore be given its full effect as it has a significant role to play in the interpretation and application of s 90A. Ordinarily a certificate under s 90A(2) must be tendered in evidence in order to rely on the provisions of s 90A(3) and (4). However, the use of the words 'may be proved' in s 90A(2) indicates that the tendering of a certificate is not a mandatory requirement in all cases. In *Public Prosecutor v. Chia Leong Foo* [2000] 1 MLRH 764; [2000] 6 MLJ 705; [2000] 4 CLJ 649, a plethora of authorities was referred to in ruling that facts to be presumed can, instead, be proved by other admissible evidence which is available (at pp 722-723). Thus the use of the certificate can be substituted with oral evidence as demonstrated in *R v. Shepherd* [1993] 1 All ER 225 in dealing with a provision of law similar to s 90A. Needless to say, such oral evidence must have the same effect as in the case of the use of a certificate. It follows that where oral evidence is adduced to establish the requirements of s 90A(1) in lieu of the certificate the presumptions attached to it, in particular, the matters presumed under s 90A(4) must also be proved by oral evidence. In commenting on the nature of the evidence required to discharge the



burden in such an event Lord Griffiths said in *R v. Shepherd* [1993] 1 All ER 225 at p 231:

The nature of the evidence to discharge the burden of showing that there has been no improper use of the computer and that it was operating properly will inevitably vary from case to case. The evidence must be tailored to suit the needs of the case. I suspect that it will very rarely be necessary to call an expert and that in the vast majority of cases it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of knowing what the computer is required to do and who can say that it is doing it properly.

[24] It must be added that the condition precedent in s 90A(1) coupled with the stipulation on the manner of its proof makes it clear in unmistakable terms that a document made admissible by the section is only one that was produced by a computer in the ordinary course of its use; and inapplicable to one that was not so produced."

[Emphasis Added]

[53] In *Ahmad Najib Aris v. PP* [2009] 1 MLRA 58; [2009] 2 MLJ 613; [2009] 2 CLJ 800, the Federal Court held:

"[33] I agree with the views expressed in the above passages from *Hanafi Mat Hassan v. Public Prosecutor* in the analysis of s 90A. In substance therefore the fact that a document was produced by a computer in the course of its ordinary use may be proved by the tendering in evidence of a certificate under s 90A(2) or by way of oral evidence. Such oral evidence must consist not only a statement that the document was produced by a computer in the course of its ordinary use but also the matters presumed under s 90A(4). On the other hand the presumption contained in s 90A(6) can be resorted to only when the document was not produced by a computer in the course of its ordinary use.

...

[37] Notwithstanding the above arguments advanced on behalf of the appellant and the prosecution, I am of the view that before the CCTV tapes can be admitted as evidence it must be considered whether they are documents produced by a computer. A CCTV tape clearly falls within the definitions of "document" and "computer" under s 3 of the Act.

...

[40] A CCTV tape is therefore a document produced by a computer. It follows that the CCTV tapes (P19A-D) must satisfy the requirements



of s 90A of the Act before they can be admitted in evidence. As this had not been done they are inadmissible."

[Emphasis Added]

[54] See also the case of *Public Prosecutor v. Lee Chor Hean* [2018] MLRHU 1665 where my learned brother Lim Chong Fong J excluded CCTV evidence for failure to comply with the relevant provisions of s 90A of the Evidence Act 1950.

[55] It is clear from the above cases that the CCTV recording here cannot be admitted and marked as an exhibit and the prosecution cannot thus place reliance upon the same.

[56] Although PW15 in his testimony said that he went to the CCTV control room to view the recording, he failed to reveal how or who identified the Accused as the person in the CCTV.

[57] Whomever identified the Accused as the person seen in the CCTV recording was never called. No reliance can therefore be placed on PW15's testimony in this respect.

Compact Discs "CD"

[58] The prosecution also tendered compact discs (CD) ("CD-R CORETECH") marked as A, B and C through PW7 with images purportedly showing the Accused at the said flats on the day of the incident.

[59] PW7 further produced an Analysis Report (laboratory no: 18F0602) (P14) dated 10 October 2018. The images extracted from P14 are reproductions from the CCTV recordings.

[60] P14 shows the images of a man whom the prosecution says resembles the Accused entering the Condo at 23.4.39 and 23.4.41 minutes on the day of the incident. It also contains an image of this person allegedly leaving the Condo at 23.43.47.

[61] The issue is whether P14 as an exhibit is compromised because it is reproduced from the CCTV recording which was not admitted as an exhibit for failure to comply with the relevant provisions of the EA.

[62] PW7 said that the time displayed in the images shown in P14 cannot be determined because she received a recording from a CD and not the CCTV itself. She said that she cannot be certain of the time unless the DVR itself was sent to her.

[63] As the images shown in P14 is a reproduction from the inadmissible CCTV recording, the said images must be treated with some degree of caution. Although tendered and marked as a prosecution exhibit, P14 derives its claim to reliability directly from (ID 12 & 13). It follows logically that the degree of



reliability placed upon P14 in identifying the Accused must also necessarily be low.

[64] In any event, PW7 testified that the images extracted were unclear "hasil analisis tidak berjaya mengeluarkan imej tersebut dengan terang dan jelas", because the resolution of the CCTV was low and the light visibility in the surrounding area was also low.

[65] PW7 admitted in evidence that only a physical image of an individual wearing a certain type of T-shirt emerged. PW7 said that the precise time related to the said images could not be ascertained as it was only a recording on a CD and not directly from the CCTV recording.

[66] P7 further said that she was unable to ascertain that the time displayed in the images in P14 were in real time. PW15 also agreed that PW7 did not see the person exiting at 11.50pm. and that the CCTV recordings were fragmented.

[67] There is therefore no evidence emanating from P14 indicating what time the person left the Condo.

[68] Further, PW7 while giving her testimony had never identified the Accused as being the individual shown in P14.

[69] Considering all the circumstances it is patently unsafe to rely upon this piece of evidence as constituting identification of the Accused. Therefore, for the reasons advanced above, no probative weight is to be accorded to P14.

[70] Quite apart from all of this, there was no evidence that PW15 had witnessed the recording from the CCTV to the CD as the CD was only handed over to PW15 much later. The original CCTV decoder was also not tendered in evidence.

[71] Under all the circumstances therefore, it can be concluded that there was no positive identification of the Accused as being the person entering and exiting the Condo on the day in question.

Wats App Messages

[72] The prosecution also attempted to tender in evidence through PW6, the deceased's husband, a series of messages through the Wats App on his mobile phone purportedly from the deceased.

[73] This piece of evidence again was obviously sought to be tendered with the objective of showing a link between the deceased's death and the acts of the Accused and the fact that the deceased was last seen with him.

[74] For ease of reference, these wats app messages are reproduced as follows:

"Call me



Urgebt6

Pls

Very Urgenet

Help me

He's here

Help me"

[75] Although PW6 said that these messages were from the deceased's hand phone to his mobile and were received on 30 November 2017 from around 11.10pm., until 11.12pm, the prosecution did not tender both the mobile phone of the deceased and PW6's mobile phone as evidence of these messages.

[76] Although a photograph or print out of these messages and the telephone number of the deceased's hand phone were sought to be tendered in as evidence, they were not converted into a prosecution exhibit and remained as ID8(A).

[77] The authenticity of the messages were further challenged by the defence when it was pointed out to PW6 that there were certain discrepancies between the messages as read out by PW6 from his mobile phone in court as compared to exhibit ID8(A), namely, "Wifey" on the hand phone as compared to "Wifey II" in ID8(A) and "I finish futsal" on the mobile phone is not shown in ID8(A). When questioned as to these discrepancies, PW6 merely said that maybe he had updated the wats app.

[78] There was also no evidence from the relevant service provider or telco as to the authenticity of these messages. This court is thus only left with the oral evidence of PW6 that these messages were sent to him from the deceased.

[79] PW6 testified that "Jasen" is a college mate of the deceased. PW6 said he has never met Jasen. PW6 said that the deceased had told him while in hospital that she was beaten up by Jasen and PW6 then asked her to end the relationship she had with Jasen and return back home.

[80] PW6 said that after the deceased was discharged from hospital, she told him that she had settled everything after which he did not hear from her again until he received those wats app messages.

[81] With regard to the wats app messages as testified to orally by PW6, these do not identify who the said "He" is. The name of the Accused is not stated. Although PW6 said that the deceased previously told him about a person named Jasen, PW6 had never met him.

[82] The probative value therefore of these messages as stated by PW6 are not



such as to provide a positive link to the Accused as being the person mentioned in them.

[83] The evidence as a whole therefore does not therefore conclusively point to the fact that the Accused was the last person seen with the deceased prior to her death sufficient to raise the "Last seen together" concept.

[84] In any event, even if it can be concluded that the Accused was present at the unit that day, the circumstances do not point irresistibly to the Accused as being the person responsible for the death of the deceased.

[85] In *PP v. Hanif Basree Bin Abdul Rahim* [2004] 1 MLRH 375; [2004] 3 MLJ 271; [2004] 3 CLJ 700; [2004] 5 AMR 204 the High Court held as follows:

[61] I have already given my reasons why I rejected the story of the prosecution's star witnesses, SP10 and SP11, on their evidence of the accused being the person last seen together with the deceased. Now, even if their evidence were accepted by this court, **the mere fact that they were last seen together does not necessarily lead to an irresistible inference that the accused had committed this crime, although that circumstance is of an incriminating nature against the accused (see Ratanlal and Dirajlal's Law of Crimes, 24th Edn p 1378). There must be other circumstances that may go to show that the accused alone had committed this murder.** These came in the form of the scientific evidence adduced by the prosecution. Alas, these evidence too fell short of the standard needed even at establishing a prima facie case. In fact those scientific evidence, especially the existence of the "Unknown Male 1" being seemingly the last person to have been with the deceased, were laden with doubts, besides the inferences this court had found to be favourable to the accused. It is trite law in any criminal trial the defence is entitled to punch holes and create doubts even at the prosecution stage. In this case, I found that the defence needed little effort to do so because, in my view, the scientific evidence on their own were destructive of the prosecution's case.

[Emphasis Added]

Motive

[86] The prosecution submitted a possible motive for the murder of the deceased by the Accused was because the deceased had expressed an intention to reconcile with PW6 which did not go down too well with the Accused. It was also submitted that the Accused's hurried exit out of the flats was evidence of conduct subsequent to the criminal act.

[87] This however, bordered on mere speculation and conjecture in the absence of any direct evidence that placed the Accused as the person who exited the premises in a hurry.

[88] PW8, who was previously a housemate of the deceased, testified that the



Accused was acquainted with the deceased and frequently visited the premises of the deceased. PW8 identified the location of the deceased's Condo and said that the deceased was the owner of Unit D-19-2.

[89] PW8 said that the Accused had once stayed over with the deceased in July of 2017. PW8 testified further that the deceased intended to reconcile with her husband ("PW6") and expressed that she had wanted to distance herself from the Accused.

[90] The evidence revealed however that PW8 had last met the deceased on 22 November 2017 and had no contact with the deceased thereafter and subsequently heard that the deceased had passed away.

[91] In cross-examination, PW8 testified that the relationship between the deceased and the Accused was relatively good and that to the best of her knowledge, the deceased had never lodged any police report against the Accused out of fear for her own safety.

[92] PW8 also said that the deceased person had not reconciled with her husband and up to the date of her passing was still living apart from him. PW8 agreed in cross-examination that if she wanted to she could deny the entry of visitors to her Condo unit.

[93] The testimony of PW8 that the constitution of the deceased was strong, bold and independent and willing to face life's challenges, and therefore would not have taken her own life, was pure speculation and amounted to her mere opinion on the matter. As such it did not constitute sufficient evidence to implicate the Accused in the crime.

[94] The sum total of PW8's testimony as gathered from the above does not evidence any clear and positive link to the Accused as being the person responsible for the death of the deceased. It also rules out any clear motive on the part of the Accused.

[95] Quite apart from the above and as learned counsel for the defence had pointed out, PW8's testimony in fact disclosed the presence of another roommate by the name of Dianne who had left the premises on 1 December 2017.

[96] PW8 admitted that the said Dianne and the deceased had an acrimonious relationship and they often had small arguments about keeping the toilets and the kitchen clean. PW15 also agreed that there was a roommate by the name of Dianne and that no statement was taken from her.

[97] This raises the question of whether or not the possibility of the said Dianne's involvement in this unfortunate episode had been excluded by the prosecution.

[98] As it transpired, the said Dianne was not called by the prosecution as a witness nor offered and neither was her absence vouchsafed by the



prosecution.

[99] The ultimate result of this is that the possible involvement of the said Dianne as a suspect had not been ruled out by the prosecution.

[100] PW15 in his testimony stated that the Accused left the premises on the ground floor at around 11.50pm., whereas PW7, the expert who analysed the CCTV recording, stated in oral examination that the Accused person was nowhere to be seen at that time.

[101] The ultimate result of this is that there is no evidence as to what time the Accused had allegedly left the premises that day.

Gaps In The Prosecution Case

[102] The defence submitted that the prosecution failed to call material witnesses. A security guard by the name of Lilinath Tamang, a Nepalese citizen, was stationed at the entrance to the lobby of Block D of the said Condo on the day of the incident.

[103] Instead, the prosecution called PW5, the security supervisor who was station at the security office, which the defence submitted, was further away from the place of the incident.

[104] Unlike the security guard stationed at the entrance to Block D, PW5 was not in a position to say who were the persons entering or exiting the lobby of Block D of the said premises at the material time.

[105] It was also pointed out by the defence that the prosecution failed to advance reasons for the unavailability of this witness. No documentary or other evidence was also tendered to indicate that the said witness had exited the country or otherwise.

[106] The fact that the said witness was merely offered to the defence did not avail the prosecution where there existed a material gap in the prosecution case which was not closed. See *Abdullah Zawawi v. Public Prosecutor* [1985] 1 MLRA 103; [1985] 2 MLJ 16; [1985] CLJ (Rep) 19.

[107] It also raised the adverse presumption against the prosecution under s 114(g) of the Evidence Act 1950. See *Munusamy Vengadasalam v. PP* [1986] 1 MLRA 292; [1987] 1 MLJ 492; [1987] CLJ (Rep) 221.

[108] Under all the circumstances, the non-calling of the said security guard and the maker of the CCTV recordings earlier alluded to similarly raised the adverse presumption under s 114(g) of the Evidence Act 1950 against the prosecution as well as resulted in a material gap in the prosecution case which was not closed.

Position Of The Deceased's Body



[109] The defence submitted that the testimony of the Investigating Officer (IO), PW15, that the place where the deceased's body was found was aligned or "selari" with unit no: D-19-2 was based upon hearsay evidence.

[110] This is because according to PW15's testimony, when he arrived at the premises at 3.00 pm., the deceased's body was already placed on to the police vehicle.

[111] This being the case, I agree with the submission by the defence that PW15's testimony was hearsay as it was evident that he had no personal knowledge of where the deceased's body lay upon his arrival at the premises.

[112] In any event, this piece of evidence also did nothing to implicate the Accused.

Forensic Evidence

[113] The available forensic evidence in the form of a cigarette butt found in the premises, exhibit P16(a), and tendered through PW14, revealed the presence of the Accused's DNA.

[114] PW14 however, was unable to confirm whether exhibit P16(a) was smoked by the Accused on the date of the incident or prior to that date.

[115] PW8 had stated that the Accused had previously been to the premises and to her knowledge had even spent the night there on one occasion. The possibility therefore that the Accused had smoked the cigarette in the premises on an occasion prior to the date of the incident cannot be ruled out.

[116] It was also disclosed by PW14 that there was another cigarette butt left behind in the unit and PW14 agreed that it could have possibly belonged to a third person.

[117] It is trite that where the circumstances of the case admits of more than one inference, that in favour of the Accused must be adopted. As such, this piece of forensic evidence by the prosecution also does not conclusively and irresistibly point to the Accused as the perpetrator of the crime.

[118] There was further no blood or DNA extracts of the deceased found on the clothing or fingernails of the Accused.

[119] Although PW5 said that the flat unit was in disarray or "berselerak", he did not provide details as to why he said that. This however was in stark contrast to the evidence of PW15 who agreed that the place was not in a mess and that there were no signs of a struggle.

[120] There was further no evidence from any of the neighbours of any commotion, disturbance, or any signs of struggle at the flat prior to the death of the deceased or evidence of any shouting or cries for help emanating from the flat unit. No bloodstains were also discovered at the premises.



[121] PW15 also agreed that to enter the Condo, all visitors must first register and that on the day of the incident there was no record of the Accused's name being on the register.

[122] The evidence from PW12 and the Post Mortem Report, P28, which stated that the cause of death was due to "Multiple injuries consistent with fall from height" does nothing to implicate the Accused as the person who caused the fall of the deceased from height.

[123] It is clear from the above analysis that the evidence presented by the prosecution against the Accused is circumstantial in nature.

Circumstantial Evidence

[124] Where the evidence is circumstantial, certain principles of law are called into operation. The following cases afford useful guidelines as to what they are.

[125] In the case of *Public Prosecutor v. Azilah Hadri & Anor* [2015] 1 MLRA 431; [2015] 1 MLJ 617; [2015] 1 CLJ 579; [2015] 1 AMR 641, it was held:

"The prosecution's case rests substantially or entirely on circumstantial evidence. It is trite that direct evidence of the commission of the offence is not the only source from which a trial court can draw its conclusion prior to a finding of guilt. **Conviction can be secured based on circumstantial evidence provided that:**

(a) the circumstances from which the conclusion of guilt is to be drawn has been established;

(b) the facts so established is consistent with the hypothesis of the guilt; and

(c) circumstances should be of a conclusive nature in that the chain of evidence is complete so as to exclude any conclusion consistent with the accused person's innocence (See *Magendran Mohan v. PP* [2012] 5 MLRA 333; [2011] 6 MLJ 1; [2011] 1 CLJ 805; [2011] 2 AMR 680, *Mazlan Othman v. PP* [2013] 1 MLRA 568; [2013] 1 CLJ 750; [2013] 1 AMR 600; *Dato' Mokhtar Hashim & Anor v. PP* [1983] 1 MLRA 7; [1983] 2 MLJ 232; [1983] CLJ (Rep) 101; *Chan Chwen Kong v. Public Prosecutor* [1962] 1 MLRA 32; [1962] 1 MLJ 307).

It is worth noting that the court had this to say in *PP v. Letchumanan Krishnan* [2007] 5 MLRH 611; [2008] 3 MLJ 290:

It is axiomatic under our case-law, and we cite the principle repeatedly, that circumstantial evidence alone may be sufficient to support a conviction for murder since the law



makes no distinction between circumstantial evidence and direct evidence and, **if circumstantial evidence is used to provide for a conviction; it must be inconsistent with any other hypothesis than that of guilt of the accused.** (See e.g., *Kartar Singh & Anor v. Rex* [1952] 1 MLRA 340; [1952] 2 MLJ 85; *Idris v. PP* [1960] 1 MLRA 265; [1960] 1 MLJ 296, *Sunny Ang v. PP* [1965] 1 MLRA 38; [1966] 2 MLJ 195; *Karam Singh v. PP* [1967] 1 MLRA 416; [1967] 2 MLJ 25; *Chong Kim Siong v. PP* [1967] 1 MLRA 123; [1968] 1 MLJ 36; *PP v. Hanif Basree Abdul Rahman* [2006] 2 MLRA 641; [2007] 2 MLJ 320; [2007] 2 CLJ 33; [2007] 1 AMR 386 and *Juraimi bin Jussin v. PP* [1997] 2 MLRA 342; [1998] 1 MLJ 537; [1998] 2 CLJ 383).

Faizal Ali J when delivering the judgment of the Supreme Court in *Ram Avtar v. The State (Delhi Administration)* AIR [1985] SC 1692, had occasion to state:

At the very outset we might mention that circumstantial evidence must be complete and conclusive before an accused can be convicted thereon. This, however, does not mean that there is any particular or special method of proof of circumstantial evidence. We must, however, guard against the danger of not considering circumstantial evidence in its proper perspective, e.g., where there is a chain of circumstances linked up with one another, it is not possible for the court to truncate and break the chain of circumstances. In other words where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.

The above cases have clearly laid down certain guidelines, whereupon in the absence of direct evidence, the prosecution may resort to adducing circumstantial evidence to discharge its burden. Crimes are usually committed in secret and under condition where concealment is highly probable. If direct evidence is insisted under all circumstances, a successful prosecution of vicious criminals, who have committed heinous crimes in secret or secluded places, would be near impossible. In this case not only was the heinous crime committed at a secluded place but the deceased's body was blasted beyond recognition. Only fragments of bones were found."

[Emphasis Added]

[126] The Court of Appeal case of *Yii Soon Ho v. Public Prosecutor* [2014] 5 MLRA 249; [2014] 5 MLJ 547 considered the following leading authorities on the subject of circumstantial evidence, namely, *Sunny Ang v. Public Prosecutor* [1965] 1 MLRA 38; [1966] 2 MLJ 195; *Jayaraman Velayuthan & Ors v. PP*



[1982] 1 MLRA 20; [1982] 2 MLJ 306; [1982] CLJ (Rep) 130; *Public Prosecutor v. Magendran Mohan* [2005] 1 MLRH 567; [2005] 6 MLJ 6; [2005] 3 CLJ 592; *Chan Chwen Kong v. Public Prosecutor* [1962] 1 MLRA 32; [1962] 1 MLJ 307; *Karam Singh v. Public Prosecutor* [1967] 1 MLRA 416; [1967] 2 MLJ 25; and *Chang Kim Siong v. Public Prosecutor* [1967] 1 MLRA 123; [1968] 1 MLJ 36.

[127] The illuminating judgment of Varghese George JCA in *Yii Soon Ho v. Public Prosecutor (supra)*, opined that the combined effect of all these cases was that a conviction based on circumstantial evidence was good in law if the cumulative effect of all evidence lead to an irresistible conclusion that it was the accused who committed the crime. This is what His Lordship said:

"Suffice it here to reproduce some guiding excerpts from the aforecited authorities, to support that position.

In Sunny Ang's case (where the deceased's body was never found) the Federal Court noted:

"...The second question to which I must draw your attention is that in this case, depending as it does on circumstantial evidence, is whether the cumulative effect of all the evidence leads you to the irresistible conclusion that it was the accused who committed this crime. Or is there some reasonably possible explanation such, for example - was it accident? "

Thomson CJ's comments in *Chan Chwen Kong* were in the following terms:

"...where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner? "

In *Karam Singh*, HT Ong FJ stated:

"...In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused..."

And in *Chang Kim Siong*, the Federal Court emphasised that:

"The onus on the prosecution where the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient."

[Emphasis Added]



[128] It is thus clear that although a conviction can be sustained by reliance on circumstantial evidence, it must admit of no other possibility other than that it was the accused who committed the murder.

[129] It is also clear that where the evidence is of a circumstantial nature, the burden upon the prosecution is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused and if there are gaps in it, then it is not sufficient.

[130] From the evidence disclosed, there were several inferences arising in this case. Could the Accused have pushed the deceased over the balcony of the unit in a fit of rage pursuant to an argument with the deceased that day?

[131] Could the deceased, have taken her own life being so distraught either following an argument with the Accused that day while at the premises or as a result of a telephone conversation with him?

[132] Could the deceased have accidentally fallen down pursuant to her issuing a threat to the Accused that unless he left her alone, she would take her own life?

[133] Could the deceased have been so depressed as a result of her tumultuous relationship with the Accused that she decided to take her own life independently of any quarrel or incident with the Accused that day?

[134] These are just some of the possible scenarios that could have presented itself that day. As alluded to, the inference favourable to the Accused person must be adopted in such situations.

[135] It is also significant that the security guard PW5 agreed with the suggestion of counsel that the balcony railing was low and he agreed that it could be about 3 feet.

[136] This fact is consistent that the fall could have been attributed to the deceased either falling accidentally or her committing suicide as opposed to the situation where the balcony is much higher which would exclude the possibility of suicide or accidental fall unless someone were to push the person over intentionally.

[137] The arresting officer PW13 also said that there was an arrangement made for the Accused to surrender himself at a restaurant, Al-Sarifah. As such the subsequent conduct of the Accused did not give rise to the inference of guilt.

[138] While the circumstances that day might arouse some manner of suspicion against the Accused, this is no substitution for proof in a court of law. The available strands of evidence does not lead me to the irresistible conclusion that it was the Accused who committed this crime neither is such evidence inconsistent with any other hypothesis than that of the guilt of the



Accused.

[139] The prosecution has thus failed to prove the third and fourth ingredient of the offence under s 300 of the Penal Code.

Decision

[140] The prosecution evidence presented was such that were I to decide to call upon the Accused to enter his defence and he elected to remain silent, I was not prepared to convict him on the totality of the evidence contained in the prosecution case. See *Looi Kow Chai v. Public Prosecutor (supra)*.

[141] After conducting a maximum evaluation of the evidence presented by the prosecution, and after considering the submissions of both parties, I find that the prosecution has failed to establish a *prima facie* case as required under s 180(2) of the Criminal Procedure Code.

[142] I therefore acquit the Accused of the charge against him without calling him to answer on his defence.



RAHMANI ALI MOHAMAD

v.

PP

Court of Appeal, Putrajaya
 Azahar Mohamed, Rohana Yusuf, Tengku Maimun JJCA
 [Criminal Appeal No: B-05-164-06-2012 (IRN)]
 10 June 2014

Criminal Law: *Dangerous Drugs Act 1952 — Section 39B(1)(a), (2) — Penal Code, s 34 — Trafficking in dangerous drugs with common intention — Appeal against conviction and death sentence — Whether appellant had successfully rebutted presumption of knowledge on a balance of probabilities*

In the High Court, the 2nd accused/appellant was charged and tried together with the 1st accused for the common intention of trafficking in 14,654g of methamphetamine, an offence in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 (“DDA”), and punishable with the mandatory death penalty prescribed under s 39B(2) of the DDA read with s 34 of the Penal Code. Both the appellant and 1st accused were Iranian nationals. It was the prosecution’s case that the appellant and 1st accused were in physical custody and control of two bags, which were later found to contain the impugned drugs. The 1st accused was acquitted of the trafficking charge by the High Court Judge (“Judge”) without his defence being called. The appellant, however, was convicted of the trafficking charge and was sentenced to death. Hence, the present appeal by the appellant in which the central ground raised was that the Judge had misdirected himself when he failed to rule that the appellant had successfully rebutted the presumption of knowledge on a balance of probabilities.

Held (allowing the appeal):

(1) To undertake a judicial appreciation and maximum evaluation, the Judge must apply his mind to all the relevant evidence. Nonetheless, a perusal of his judgment showed that he had failed to direct his attention to the defence of the appellant; particularly, in the evidence of the investigating officer (“PW8”) that was favourable to the appellant. There was, therefore, insufficient judicial appreciation of the defence’s case. The Judge had failed to view the defence of the appellant objectively and from all angles, and this omission had seriously prejudiced the appellant. This was an error on a very crucial point directly relevant to the defence, and was a serious non-direction which amounted to a misdirection by the Judge warranting appellate intervention. Furthermore, the appellant’s right to a fair trial had been compromised as a result of the failure of PW8 to carry out an investigation to verify the appellant’s version of the facts. The appellant might thereby have lost a chance of being acquitted and there had been occasioned a failure or a miscarriage of justice. On the totality and prevailing circumstances of the present case, the appellant had rebutted the



presumption under s 37(d) of the DDA and had cast a reasonable doubt on the prosecution case. The appellant had been consistent from the time of his arrest and throughout the trial that he had no knowledge of the drugs; at most, he was only an innocent carrier. (paras 14-17)

Case(s) referred to:

Alcontara Ambross Anthony v. PP [1996] 1 MLRA 47 (refd)
Chan Pean Leon v. PP [1956] 1 MLRH 44 (refd)
Fadil Bachok v. PP [2011] 11 MLRH 311 (refd)
Gooi Loo Seng v. PP [1993] 1 MLRA 227 (refd)
Lee Kwan Woh v. PP [2009] 2 MLRA 286 (refd)
Leow Nghee Lim v. Regina [1955] 1 MLRH 614 (refd)
Lim Hock Boon v. PP [2005] 2 MLRA 779 (refd)
Mraz v. The Queen [1955] 93 CLR 493 (refd)
Pang Chee Meng v. PP [1991] 1 MLRA 608 (refd)
PP v. Chia Leong Foo [2000] 1 MLRH 764 (refd)
PP v. Lin Lian Chen [1992] 1 MLRA 297 (refd)

Legislation referred to:

Dangerous Drugs Act 1952, ss 37(d), 39B(1)(a), (2)
Penal Code, s 34

Counsel:

For the appellant: Geethan Ram Vincent (Mohd Norazihan Adnan with him); M/s Salehuddin Saidin & Assocs
For the prosecution: Samihah Rhazali; DPP

JUDGMENT**Azahar Mohamed JCA:**

[1] In the High Court, the second accused, Rahmani Ali Mohamad (“the appellant”) was charged and tried together with the 1st accused, one Ashrafi Ebrahim Hamdollah (“Ebrahim”) for the common intention of trafficking in 14,654g of methamphetamine, an offence in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 (“DDA”), and punishable with mandatory death penalty prescribed under s 39B(2) of the DDA read with s 34 of the Penal Code. Both the appellant and Ebrahim are Iranian nationals.

[2] The offence was said to have been committed on 6 June 2009 at around 4.15pm at kaunter pemeriksaan kastam A, Unit Khas Pemeriksaan Penumpang 1, arrival hall of the main terminal, Kuala Lumpur International Airport (“KLIA”). It was the case of the prosecution that the appellant and Ebrahim were in physical custody and control of two bags, which were later found to contain the impugned drugs.



[3] As it turned out, at the close of the prosecution case, Ebrahim was acquitted of the trafficking charge by learned High Court Judge without his defence being called. No appeal has been filed by the prosecution against that decision.

[4] However, learned High Court Judge came to a finding that the prosecution had made out a *prima facie* case against the appellant and therefore called upon him to enter his defence. At the conclusion of the case, the appellant was found guilty by learned High Court Judge. The appellant was convicted of the trafficking charge and was sentenced to death. The appellant then appealed to this court. We heard his appeal and we unanimously allowed it. We now give our reasons.

[5] The essential prosecution evidence adduced at the trial, which learned High Court Judge held had made out a *prima facie* case against the appellant is as follows. At the material time and place, two customs officers namely, Nor Azlina bt Zainal Abidin ("PW5") and Lim Yui Chan ("PW6") while on duty at the Bahagian Pemeriksaan Penumpang KLIA had seen Ebrahim and the appellant heading out from carousal A pulling one bag each. PW5 called Ebrahim and the appellant and asked them to scan their bags. Ebrahim was seen pulling bag P19B while the appellant was seen pulling bag P19A.

[6] Upon conducting a scan, PW5 noticed that there was a green image from both P19A and P19B. PW5 then asked PW6 to conduct a physical examination on P19A and P19B. PW6 instructed Ebrahim to open P19B. At that moment, Ebrahim signalled and pointed to the appellant. PW6 then instructed the appellant to open both the bags. After the bags were opened by the appellant, PW6 noticed that the bags had a "compartment". It was at this time, PW5 instructed PW6 to refer the matter to their immediate supervisor, Tiew Hai Kin ("PW7"). PW7 then asked PW5 and PW6 to bring Ebrahim and the appellant together with P19A and P19B to his office. Subsequently PW7 contacted Cawangan Narkotik Kastam Diraja Malaysia. The investigating officer, Samsuri bin Ibrahim ("PW8") then arrived at PW7's office. Upon examination, PW7 found both the bags to contain a total of four plastic bags filled with drugs. The drugs were found in sealed compartment in the two bags.

[7] The four plastic bags were later sent to the chemistry department for chemical examination and analysis. The chemist, Hjh Shadiah bt Mohamad ("PW1") confirmed that the four plastic bags contained a total of 14,654g of methamphetamine.

[8] On being called to make his defence, the appellant elected to give evidence under oath. The gist of his evidence is well summarised by learned High Court Judge in his judgment as follows:

Pembelaan OKT2/Perayu datang dari Iran untuk melancong ke Malaysia bersama OKT1 atas tajaan rakan beliau bernama Mohsein. OKT2/Perayu hanya membawa beg galas P30 mengandungi sedikit pakaian sahaja, begitu juga OKT1 membawa beg galas P29.



Urusan daftar masuk di Lapangan Terbang Tehran dilakukan oleh Mohsein, Amir dan Mirza Sadeghi. Apabila tiba di KLIA, “Mirza Sadeghi” memberitahu bahawa beliau ada membawa dua beg di conveyor belt bagasi. Mirza Sadeghi memberitahu bahawa 2 beg tersebut berisi barang “cenderahati”. Perjalanan mereka dari Teheran — Shiraz — Dubai — Kuala Lumpur.

OKT2/Perayu telah mengambil troli apabila tiba di conveyor belt kerana OKT1 menyuruh beliau berbuat demikian untuk meletakkan beg-beg mereka. Apabila Mirza Sadeghi mengambil dua beg beliau dari “carousel” bagasi, beliau telah meletakkan kedua-dua beg ke atas troli yang sama. OKT2/Perayu hanya bantu menolak troli untuk keluar.

Apabila melalui lorong keluar, mereka dipanggil oleh SP5 untuk mengimbas bagasi mereka. Pada masa yang sama Mirza Sadeghi memberitahu beliau keluar dahulu untuk mengambil teksi.

Menurut OKT2/Perayu, ketika itu hanya satu mesin pengimbas yang beroperasi, semua penumpang terpaksa melalui lorong tersebut; sebelum OKT1 dan OKT2/Perayu terdapat penumpang-penumpang lain di hadapan mereka.

Apabila sampai giliran mereka, setelah beg P19A dan P19B diimbas, satu daripadanya dibuka oleh Pegawai Kastam yang bertugas di situ dan bukan oleh OKT2/Perayu, beg itu tidak berkunci. Malah beliau telah memberitahu Pegawai Kastam berkenaan bahawa P19A dan P19B adalah kepunyaan Mirza Sadeghi serta meminta Pegawai Kastam tersebut mencari Mirza Sadeghi. Pada masa yang sama, Mirza Sadeghi ada menelefon OKT2/Perayu bertanya kenapa lama sangat, OKT2/Perayu ada meminta Mirza Sadeghi untuk datang ke kaunter kastam kerana pihak kastam ingin membuka P19A dan P19B, tetapi Mirza Sadeghi tidak datang.

[9] It should be pointed out that learned High Court Judge had invoked s 37(d) of the DDA to find knowledge of the appellant of the drugs concealed in the bags. Before this court, the central ground raised by learned counsel for the appellant was that learned High Court Judge had misdirected himself when he failed to rule that the appellant had successfully rebutted the presumption of knowledge on a balance of probabilities.

[10] In considering whether the appellant had successfully rebutted the presumption of knowledge, learned High Court Judge had to scrutinise the evidence as to what the appellant said contemporaneously with the act or omission and also the surrounding circumstances under which the appellant acted or failed to act (see: *Chan Pean Leon v. PP* [1956] 1 MLRH 44, *Leow Nghee Lim v. Regina* [1955] 1 MLRH 614 and *PP v. Chia Leong Foo* [2000] 1 MLRH 764).

[11] Now, it was the appellant’s case that he did not know P19A and P19B contained the impugned drugs and that he had never seen the two bags before arriving at KLIA. The appellant maintained that both the bags belonged to Mirza Sadeghi Mohammad Reza (“Mohd Reza”). According to the appellant, P19A and P19B were not checked in by him at Teheran Airport. Upon arrival



at KLIA, Mohd Reza had collected P19A and P19B from the ~~carousal~~-carousel and placed them on the scanner before heading out to get a taxi. According to the appellant, he had informed the customs officers at KLIA that the bags belonged to Mohd Reza. In order to appreciate the defence of the appellant, it is necessary to reproduce the material part of his evidence:

I also told the officer that 2 bags were not mine. I did not touch the bags. Yes, I was standing side by side with OKT1.

Then, Mohd Reza called us through handphone and asked why we was late. I told him to come back. I told something wrong with his bags. At this time P19A and P19B had been opened by a lady officer contents in the bags. We told her, it was not ours.

Mohd Reza told me through the phone that he will come. Then, they brought us into a room. There, they told us, they want to break the bags. I told it was not our bags. Then my handphone rang. Then I gave my handphone to the officer to show that the owner of the bag is on the phone and please talk to him. The officer did not talk through the phone. I tried very hard in sign language about Reza went out to get a taxi. I do not know whether the officer understand or not. I told them Mohd Reza's name.

My phone rang about 2-3 times, 2 times at the scanner. We asked Mohd Reza to come and Ebrahim also talked to him. Inside the room, I told him to speak to the officer through the handphone.

[12] This then brings into focus the evidence of the investigating officer, PW8. From PW8's evidence, the following was established during the prosecution's case itself:

- (i) The defence of the appellant was not a bare denial.
- (ii) The existence of Mohd Reza cannot be doubted.
- (iii) PW8 produced the Flight Manifest, exh. D56 (see pp. 388 and 389 of appeal record jilid 4) which proved that Mohd Reza travelled on the same flight as the appellant.
- (iv) The appellant informed PW8 that he did not know P19A and P19B contained drugs.
- (v) When the appellant was with PW8, the appellant received a number of calls on his handphone.
- (vi) PW8 did not allow the appellant to answer the calls.
- (vii) The appellant had informed PW8 in broken English that someone was waiting for him outside.
- (viii) PW8 went to Gate 6 to look for the person. The appellant was not brought along. PW8 could not find the person.



- (ix) P19A and P19B did not contain any personal items belonging to the appellant.

[13] The evidence above makes it patently clear that the defence of the appellant that the two bags belonged to Mohd Reza was not something that was sprung for the first time in the defence case (see: *Public Prosecutor v. Lin Lian Chen* [1992] 1 MLRA 297). From the evidence, it is clear that the appellant at the earliest possible opportunity had given his defence to PW8 that he had no knowledge of the drugs concealed inside P19A and P19B. One of the tests for accepting or rejecting the evidence of a witness is how far it fits in with the rest of the evidence and the circumstances of the case (see: *Fadil Bachok v. PP* [2011] 11 MLRH 311). In our judgment, a detailed and careful scrutiny of the evidence of PW8 fits in with the defence of the appellant that although he had control and custody of the two bags, he had no knowledge of the impugned drugs.

[14] This leads on to the argument of learned counsel that the defence of the appellant had not received any, or any sufficient attention from learned High Court Judge. To undertake a judicial appreciation and maximum evaluation, learned High Court Judge must apply his mind to all the relevant evidence. Nonetheless, a perusal of his judgment shows that learned High Court Judge failed to direct his attention to the defence of the appellant; particularly in the evidence of PW8 that was favourable to the appellant that we have highlighted in para 12 above. There was therefore insufficient judicial appreciation of the defence's case as contended by learned counsel of the appellant. Learned High Court Judge had failed to view the defence of the appellant objectively and from all angles. In our judgment, this omission had seriously prejudiced the appellant. This was an error on a very crucial point directly relevant to the defence. Learned High Court Judge failed to give judicious consideration to this critical aspect of the defence. In our view, this is a serious non-direction which amounts to a misdirection by learned trial judge warranting appellate intervention (see: *Gooi Loo Seng v. Public Prosecutor* [1993] 1 MLRA 227).

[15] Even more, no investigation at all was carried out by PW8 to disprove the appellant's version of fact, particularly concerning Mohd Reza, which was given by the appellant at the earliest possible opportunity. In this regard, PW8 said that he did not investigate the appellant's handphone because "saya terlepas pandang". PW8 also said, "saya tak periksa rekod-rekod panggilan keluar masuk OKT 2. Jika disiasat mungkin boleh dapat maklumat lanjut". The appellant cannot be penalised for lack of ingenuity, negligence or inadvertence on the part of the investigator depriving him of the time honoured benefit of the doubt (see: *Pang Chee Meng v. PP* [1991] 1 MLRA 608). The manner in which PW8 had conducted his investigations left many stones unturned and material gaps exist. Based on this omission, an inference in the appellant's favour ought therefore to have been drawn by learned High Court Judge at the close of the prosecution case (see: *Lee Kwan Woh v. PP* [2009] 2 MLRA 286 and *Alcontara Ambross Anthony v. Public Prosecutor* [1996] 1 MLRA 47).



[16] In our judgment, the appellant's right to a fair trial has been compromised as a result of the failure of PW8 to carry out investigation to verify the appellant's version of fact. The appellant may thereby have lost a chance which was fairly opened to him of being acquitted and that there had been occasioned a failure or a miscarriage of justice (see: *Mraz v. The Queen* [1955] 93 CLR 493 quoted with approval in *Lim Hock Boon v. PP* [2005] 2 MLRA 779).

[17] In our judgment, on the totality and prevailing circumstances of the present case, the appellant had rebutted the presumption under s 37(d) of the DDA and that the appellant had cast a reasonable doubt on the prosecution case. The appellant had been consistent from the time of his arrest and throughout the trial that he had no knowledge of the drugs; at most the appellant was only an innocent carrier.

[18] The upshot of all this was that the appellant's conviction was wholly unsafe. This appeal was, therefore, allowed. Accordingly, we quashed and set aside the conviction and sentence against the appellant. He was acquitted and discharged.



refundable item of expenditure as it was an item of loss following the hijacking.

To that end, I had given judgment to the plaintiff for the sum claimed, interest at 8% pa from 13 March 1981 to date of realization and costs.

Order accordingly.

Solicitors: Azim Ong & Krishnan; Ong Chin Beng & Rakan-Rakan.

Reported by PS Ranjan

Public Prosecutor v Wong Moy

HIGH COURT (KUALA LUMPUR) – FEDERAL TERRITORY
CRIMINAL TRIAL NO 47 OF 1985
KC VOHRAH J
7 JUNE 1988

Criminal Procedure – Investigations – Unsatisfactory conduct of investigations – Effect on prosecution case

Evidence – Sketch plan – Mistakes in plan – Features from hearsay included – Use of sketch plans in evidence – Onus of proof in criminal law – Rebuttable presumptions – Dangerous Drugs Act 1952, s 37(d) & (da)

The accused was charged under s 39B of the Dangerous Drugs Act 1952 with the offence of trafficking in heroin. The prosecution's case was that she was found, during a police raid at the premises where she rented a room, rushing towards the back portion of the premises and when arrested she had several items in both her hands, including a quantity of heroin. Her defence was that the police had fabricated the prosecution's case against her. According to her, the police had feigned the recovery of certain items from her blouse pocket which one of the police said contained heroin. She also said that the police had recovered from outside the back of the premises a bag which one of them said contained heroin and accused her of being its owner. She also claimed that some other person or persons living in one of the rooms in the house had escaped through the back door of the house when the police raided the house and that the heroin was most probably theirs.

The investigating officer had drawn a sketch plan of the premises which, although sloppily drawn and deficient in several respects, gave a general picture of the layout of the permanent features of the premises. The plan was not drawn to scale. The investigating officer had erased a line drawn to scale. The investigating officer had erased a line of 'x' marks on the plan intended to show the movements of the accused and he said that he had erased them later because he had made a mistake regarding the markings. The investigating officer had gone back to the premises about three months after the raid. Photographs of the premises were taken only four months after the raid. The sketch plan tendered in court had been prepared from an original sketch but the original sketch was not available at the trial. The investigating officer had included features in the plan based on what he had heard from a member of the raiding party who had arrested the accused.

A There were various discrepancies in the evidence of the investigating officer and the arresting officer, particularly when considered along with the sketch plan, the photographs, the police report lodged by the investigating officer after the raid, and the evidence tendered by the defence.

B **Held**, acquitting the accused: (1) Features from hearsay should not be shown in a sketch plan. Unfortunately, police witnesses still persist in putting such features in a sketch plan which should only show permanent features visible to them. Courts in admitting such sketch plans as aids to better understanding of the testimony of witnesses allow identification of the additional features unless there are objections from defence counsel.

C (2) The investigations in this case were unsatisfactorily conducted. The blemishes in the prosecution's case had become accentuated, and more blemishes had been revealed, in the light of the totality of the evidence. The evidence of certain members of the raiding party with their inherent inconsistencies and their inconsistencies when viewed against the police report, the sketch plan, the evidence of the investigating officer and the defence left the court in a state of doubt as to what actually took place at the time of the raid.

D (3) The cardinal principle enshrined in the law of the country is that the onus of proving the guilt of an accused is throughout on the prosecution and if upon the whole evidence the court is left in a real state of doubt, the prosecution had failed to satisfy the onus of proof which is upon it. The accused had succeeded in raising a reasonable doubt on the prosecution's story that she was in possession of the drugs.

E (4) In the result the court did not have to consider the rebuttable presumptions raised under s 37(d) and (da) of the Act, namely, that she was deemed to have known the nature of the drugs and that she was deemed to have trafficked in the drugs.

F Cases referred to

- 1 *R v Lim Kang Chui* [1949] MLJ 211 (folded)
- 2 *Mat v PP* [1963] MLJ 263 (folded)

Legislation referred to

Dangerous Drugs Act 1952 ss 37 & 39

G *Ahmad Rosli bin Mohd Sham* (Deputy Public Prosecutor) for the prosecution.

Khairuddin bin Suleiman for the accused.

Cur Adv Vult

KC Vohrah J: In this case the accused was charged as follows:

H That you on 5 October 1984 at about 9.30pm, at house No 71, Jalan Berangan, in the federal territory of Kuala Lumpur, did on your own behalf traffick in dangerous drugs, to wit, 29 plastic packets of heroin and 92 straw tubes of heroin weighing a total of 18.62g, in contravention of the provision of para (a) of sub-s (1) of s 39B of the Dangerous Drugs Act 1952, and that you have thereby committed an offence punishable under s 39B(2) of the said Act.

I The prosecution's case against the accused is that she was found, during a police raid at No 71, Jalan Berangan, rushing towards the back portion of the premises and when arrested, she had several items in both her hands. In her right hand she held a newspaper package contain-

ing four plastic packets and a small purse containing 24 straw tubes. The four plastic packets and the 24 straw tubes held substances which contained heroin. In her left hand she held a red plastic bag containing a 'glucolin' tin, a weighing scale in a container, two bundles of empty straw tubes and two bundles of empty plastic bags. The 'glucolin' tin contained 25 small plastic packets, ten straw tubes and a large plastic packet containing 58 short straw tubes all of which held substances which contained heroin. The total weight of all the heroin found on her came to 18.62g according to the report of a government chemist.

In view of the nature of the cross-examination directed at the raiding officers, PW4 and PW5, and at the investigating officer of the case, PW1, it would be necessary to have some idea of the arrangement of the rooms, passage way, doors and entrances within the premises. This can be gathered from the description of the premises given by the relevant witnesses as aided by photographs (P28A to E) taken of the outside and the inside of the premises and by the sketch plan (P27) of the place which, although sloppily drawn by PW1 and deficient in several aspects, gives a general picture of the layout of the permanent features of the place.

As one faces the premises one meets with a door with a transparent glass panel (glass door). Beyond the glass door on the right side are four rooms, one after another, in a row. For convenience, I adopt the designation of these rooms marked by the investigating officer (the 'IO') in the sketch plan as B, C, D and E respectively, front to back. On the left as one enters the door is an open space which reaches a wall (dividing wall) which comprises, roughly, a bottom half of solid material and an upper half with glass-paned louveres. Between the right end of this wall and the wall of a room on the right is an entrance. Beyond this wall on the left is another open space which appears to be a dining area. This space is bordered on the right by the wall of room D. Towards the back on the left it reaches a room which is designated F by the IO, and which I adopt. The door to this room had been incorrectly, as admitted by him, marked by the IO in the sketch plan. In actual fact the door to this room faces the front of the premises and opens into the dining area.

Between room F on the left and roughly the last room, room E, is a narrow passage way which leads to an entrance which opens into the back portion of the premises.

At the back of this portion facing this entrance is what appears to be a rectangular concrete structure with an upright and large cylindrically shaped pipe leading into the structure. This structure has been referred to in the evidence as the 'rubbish chute'. To the right of the

A entrance to the back portion is the kitchen though this cannot be seen in any of the photographs.

I now come to what raiding officers, PW4 and PW5, did and saw at these premises.

B PW4, Inspector Mohd Yusof, raided the premises accompanied by PW5, Detective Corporal Khabri, and three other police personnel on 5 October 1984 at 9.30 pm.

C PW4 stated that when he arrived at the premises he found the front door of the premises to be made of glass and he could see clearly the inside as the house was lighted. He knocked at the glass door several times. He saw a woman, the accused, come out from a room on the left, room F, and walk towards the glass door. At that time she was not carrying anything. When she was near the glass door PW4 signalled her to open the door and PW4 said he said 'polis'. The woman, the accused, D however, ran towards the back portion of the house. Inspector Mohd Yusof then instructed a detective constable, Mohamad, to break the glass door. The inspector's attention was then directed to the breaking of the glass which took about 30 seconds. When the glass was broken he stepped into the house. Then, according to him, he E and PW5, Khabri, gave chase to the accused.

F Khabri corroborated what Inspector Mohd Yusof described up to the point where DPC Mohamad started to break the glass door. He said that whilst the glass was being broken he kept observation on the woman after Inspector Yusof had identified himself. He said he saw the woman, the accused, run towards room F which she had earlier come from. He saw her enter the room and then come out from the same house carrying something and run towards the back portion of the premises.

G I now come to the next segment of time in regard to the raid.

H Inspector Mohd Yusof stated that he entered the house as soon as the glass door was broken. He saw the accused head towards the kitchen. He said he and Khabri managed to arrest the woman at point 'X' in the sketch plan; Khabri held both hands of the accused. It will be noted that 'X' in the sketch plan cannot be seen from the glass door area or from the passage. He said that when Khabri caught hold of her hands she put up a struggle and eventually with the assistance of one Detective Constable Rosli, Khabri managed to handcuff the accused.

I Inspector Mohd Yusof said he found a newspaper package and a brown purse in her right hand and a plastic bag in her left hand.

Khabri corroborated Inspector Mohd Yusof's evidence as to the chase, his catching hold of both hands of the accused, the struggle put up by the accused, the discovery of the things in her hands and the handcuffing

of the accused. He confirmed that the arrest was made in the kitchen area.

Then the premises were searched by Inspector Mohd Yusof. According to him and Khabri, nobody else apart from the accused and the police personnel were in the house. PW1 inspected all the rooms B to F except for room E which was padlocked. Room F, according to Inspector Mohd Yusof, appeared to be used as a store-room — it had a bed, some prayer items and 'old-things'.

According to Inspector Mohd Yusof, during the search he was informed by one Inspector Sukmin, who had accompanied the police in the raid, that he had detained three persons who had tried to enter the premises. After the search he brought the accused, the other persons who had been arrested and the items seized from the accused to his office. He then handed over the seized items to PW1, Inspector Razali Goneng, the investigating officer of the case.

In the newspaper wrapper (P2) were four plastic packets (P3A to D) containing substances suspected to be heroin. In the purse (P6) were 24 straw tubes (P7A to X) also containing substances suspected to be heroin. The newspaper package and purse were found in the accused's right hand.

The plastic bag (P10) found in her left hand contained a 'glucolin' tin (P11), a weighing scale (P20) in a yellow container (P21), two bundles of empty straw tubes (P22A and B) and two bundles of empty plastic bags (P23A and B).

The 'glucolin' tin contained 25 small plastic packets (P12A to Y), ten straw tubes (P14A to J) and 58 short tubes (P18¹⁻⁵⁸) in a plastic bag (P17), all containing substances suspected to be heroin.

The investigating officer of the case, PW1, who received the seized exhibits from Inspector Mohd Yusof, sent them to a government chemist for analysis. The report (P26) from the chemist showed that:

- (1) the four plastic packets (P3A to D) in the newspaper wrapper (which was found in the accused's right hand) held a substance which contained 2g of heroin;
- (2) the 24 plastic tubes (P7A to X) in the purse (which was also found in the accused's right hand) held a substance which contained 0.69g of heroin;
- (3) the 25 plastic packets (P12A to Y) found in the 'glucolin' tin in a plastic bag (which was found in the accused's left hand) held a substance which contained 11.67g of heroin;
- (4) the ten plastic straw tubes (P14A to J) (found in the 'glucolin' tin) held a substance containing 2.24g of heroin;
- (5) the 58 short plastic tubes (P18¹⁻⁵⁸) (found in a plastic packet in the 'glucolin' tin) held a substance containing 2.02g of heroin.

A The total weight of the heroin found on the accused was therefore 18.62g of heroin, a drug listed in the First Schedule to the Dangerous Drugs Act 1952.

B Before I deal with the question of whether the prosecution has made out a prima facie case of trafficking in heroin on the charge against the accused, it would be necessary to consider what the cross-examination of the prosecution witness revealed. The primary aim was to show that the prosecution's case was a fabricated one. In particular the cross-examination attempted to show:

- C (1) that the accused came out from her bedroom, room C, which was situated on the right of the room and not from F, the room on the left side;
- (2) that when she saw PW1 she went back to room C to fetch her key;
- (3) that there were other tenants in the premises at that time;
- D (4) that tenants from room F shouted to her not to open the door as 'they' (the people at the glass door) could be robbers;
- (5) that as a result the accused stayed in her room and the police then broke open the glass door;
- (6) that the police then went to the back portion of the premises and searched the place and the backyard;
- E (7) that a girl, Chong Siew Yoke, came out crying from a room.

All the above were put to Inspector Mohd Yusof and Detective Corporal Khabri. They denied all the allegations.

F Inspector Mohd Yusof was adamant that he saw the accused come out from room F on the left side and he traced in the sketch plan the movement of the accused from room F to a point near the glass and from that point to a point Y near room E and then to point X. He said in reply to defence counsel, and this was the first time it was disclosed by him, that he saw the accused at point Y holding something. In reply to my question as to how he could see the accused in view of the dividing wall between room F and the glass door, Inspector Yusof replied that he saw the accused come out of room F through the open glass-paned louvres (a part of which can be seen from photograph P28B as being on the upper portion of the wall which is just about visible in the photograph). Inspector Mohd Yusof remarked that the door of room F was wrongly marked in the sketch plan (P27) by the investigating officer. He said this door faced the glass door (ie it faced the front of the premises) and this can be clearly seen from photograph P28C.

I Inspector Mohd Yusof was also cross-examined about an apparent discrepancy between what he said in court he saw and what he had stated in the police report (P25). In his report he said:

Apabila saya kenalkan diri saya polis perempuan Cina tersebut terus berlari kebahagian belakang dan mengambil sesuatu.

The impression given by the police report made by Inspector Mohd Yusof is that he saw her take something. In his evidence he said he did not see her take anything as he was concentrating on the door being broken. His explanation was that the report was lodged after the incident and it was made after he had discussed with Khabri as to what had happened and the report reflected the perception of others as to what took place. To my mind, on a prima facie basis, the explanation for the discrepancy appears satisfactory.

Inspector Mohd Yusof denied there were other tenants present in the house, or that he and his men went to the backyard of the house and searched the backyard. He also denied seeing a girl who came out from the room crying or that she was also brought to the police station.

Khabri, too, was adamant he saw the accused come out of room F and rush back into it after Inspector Mohd Yusof identified himself. He was adamant that he then saw her come out from the room and rush towards the back portion of the premises. He was also adamant he arrested her at the back portion of the premises which he identified as 'X' in the sketch plan. He said he pointed to the IO the place where the accused was arrested. He also said the IO had asked him a few questions as to where the accused had come from and where she had run to and he showed the IO these places. When he was confronted with the carbon copy of the sketch plan (D32) which had unerased marks in it indicating the path the accused allegedly took (according to the key to the sketch plan (both P27 and D32)) he said he did not know about D32 as it was the IO who prepared the plan. Khabri, however, agreed that at the back portion of the premises as shown in photograph P28D can be seen a rubbish chute. He agreed photograph P28E also showed the rubbish chute and he did not know why such photographs were taken (although he was there with the IO and the photographer) when the photographs were taken. And he agreed that not a single photograph of 'X' shown in the sketch P27 – showing the place where the accused was arrested, was taken. He then resiled from his earlier testimony that the accused was arrested at 'X' as shown in the sketch. He said the sketch plan was wrong and he pointed out the place of arrest as being near the rubbish chute. It is interesting to note that Inspector Yusof also referred, as was pointed out earlier, to 'X' in the sketch plan as the place where the accused was arrested.

Before I deal with the sketch plan which seemed to have caused a lot of confusion to everybody concerned in the trial, let me go back to Khabri.

Additional allegations were put to Khabri by the defence – that there was a tenant in room F who escaped through the back door and that in the backyard the police team recovered all the exhibits, that then the accused was called out from her room, the exhibits showed to her and

A one police personnel stated, 'Ini barang lu punya.' Khabri denied all these allegations.

B I now come back to the sketch plan. As I had remarked earlier it was sloppily drawn up by the IO. The sketch appeared to be drawn to scale with various markings of measurement against some parts of the layout plan, but the IO, PW1, himself admitted these markings were merely estimates; in other words the plan was not to scale. He marked the dividing wall as having a wide width but it is clear from photograph P28B and the evidence of Inspector Mohd Yusof that the width was narrower. He marked the door of room F as facing room C E but it is clear from photograph P28C and the evidence of Inspector Mohd Yusof that the door faced the front part of the premises. He failed to mark the position of the rubbish chute near where, Khabri subsequently said in evidence, the accused was arrested. Instead he marked 'X' at a point which was nearer to the kitchen, a point D which could not be seen from the front part of the house, as the place where the accused was arrested. He stated in examination-in-chief that Khabri pointed out that place to him. Khabri at first said, as was pointed out earlier, that he pointed the place of arrest at 'X' but later he disputed this and said that the point was wrongly marked E in the sketch. Khabri subsequently marked 'X1' in the sketch to show where he arrested the accused.

F PW1, the IO, who had given his evidence as the first witness, was recalled and shown a carbon copy (D34) of the sketch plan (P27) which had been tendered in court and which had been supplied to defence counsel by the police. This carbon copy showed a line of 'X' marks leading, not from the left side room F, but from room C on the right to a point near the glass door A and from that point to the point marked 'X' at the back portion of the house near the kitchen. The sketch plan P27 produced by the prosecution showed the indentation of this line G of 'X' marks though the marks themselves had been rubbed out; PW1 admitted he erased the line of 'X' marks on P27, and not on the carbon copy D34, one or two weeks after he had prepared the sketch. This was because after he completed his investigations he realized he had made a mistake on those markings. He said he H had assumed that the accused came out from her bedroom C as he had found female clothing in the room and that she came out from this room and went to the door and then turned round and ran to the back. PW1 stated that he went to the premises on 15 January 1985, ie about three months after the accused was arrested, with Khabri. I The photographs were taken on 11 February 1985. He said Khabri pinpointed various spots and he, PW1, instructed the photographer to take photographs of these places. He, however, denied that Khabri pointed out the movements of the woman as indicated by the line of 'X' marks. Khabri, on the other hand, said that PW1 had asked him where the woman came out from and where she went to.

My view is that the investigating officer did a very poor job of his investigations at the scene. He went to the scene about three months after the raid. And he caused photographs to be taken about four months after the raid. He put up a sloppy sketch plan as I had mentioned earlier and perhaps relied a lot on his memory to draw the plan. In fact he had put an original sketch from which he drew P27 but he said he could not trace the original sketch. In his evidence he stated that he did not put the line of 'X' marks on the original sketch and that when he drew up the sketch plan P27 (with carbon copy D32) he put these marks on his assumption that the accused came out from bedroom C. My preliminary view, subject to a review of the totality of the evidence after the defence has been heard, is that Khabri may have indicated to PW1 the room, room F, where Khabri said in court that the accused came from but PW1 may have misinterpreted what Khabri had told him and assumed, as he said he did, that the accused came from bedroom C because that was the accused's room and there was female clothing there; and that on that assumption marked the movements as originating from that room and ending at 'X'. The explanation that he erased the movement marks when he realized his mistake one or two weeks after investigations is in the circumstances plausible.

I am aware that features from hearsay should not be shown in a sketch plan (see *R v Lim Kang Chui*¹). Unfortunately, police witnesses still persist in putting such features in a sketch plan which should only show permanent features visible to them. Courts in admitting such sketch plans as aids to better understand the testimony of witnesses allow identification of these additional features unless there are objections from defence counsel. In the present case the witnesses PW4 and PW5 gave their evidence as to the arrest of the accused near the kitchen and it was only subsequently that they pointed to the mark 'X' near the kitchen which had been put on by the IO, without objection from counsel. But as was pointed out, though Khabri said it was at mark 'X' during examination-in-chief, he corrected himself by saying the 'X' was wrongly marked.

The sketch plan P27 did not show at first glance the marks relating to the movement of the accused within the house but after D32 was shown to the court it became clear that such marks did appear on P27; they had been erased leaving corresponding indentation marks which were clearly visible on closer examination of these additional features when it became clear that Khabri had stated in evidence that he told PW1 where the accused had come from and had gone to. These features relate to facts connected to the facts in issue whether the accused was in possession of the heroin and had guilty knowledge of the heroin. These connected facts whether she walked from room F or room C, whether she went to the back portion after entering room F or she went back to room C

A are disputed and questions touching on what the two witnesses, the IO and Khabri, said to the other in regard to the pointing out of relevant places and movement of the accused and which relate to the additional features, are relevant to show the existence or non-existence of the collateral issues, whether she came out from her own bedroom or another room and whether she ran back to the other room to take incriminating heroin. These collateral issues are so inseparably connected with the facts in issue whether she was in possession of the heroin and whether she had guilty knowledge of the same and I allowed questions to be asked on the additional features in the sketch plan.

C The cross-examination by defence counsel revealed several discrepancies as have been sketched out but I am satisfied that, on a prima facie basis, the discrepancies have arisen principally because of reliance on a sketch plan which is misleading in several aspects by Inspector D Mohd Yusof and Khabri. The main thrust of their evidence is that the accused was found in possession of the heroin as is specified in the charge and that she ran away from the police when Inspector Mohd Yusof identified himself as a police officer carrying the incriminating objects which she took from a room. These primary facts E are not inherently incredible. I would have to hear the defence rebuttal to re-evaluate the prosecution's case in the light of the totality of the evidence in the trial. In view of the fact that it is established on a prima facie basis that she had possession of the heroin, she is deemed to have known its nature under s 37(d) of the Dangerous F Drugs Act 1952 and in view that the amount of heroin was 18.62g she is deemed to have trafficked in the drugs. She therefore has to rebut these presumptions.

Defence

G The accused elected to give her evidence on oath and relied on a cautioned statement which she made shortly after her arrest on 9 October 1984. She did not call any witnesses.

H Her defence was that the police had fabricated the prosecution's case against her; that the police feigned recovery of a red purse and a newspaper package which one of them said contained heroin from her blouse pocket; that the police recovered from outside the back premises a pink bag which one member of the police said contained heroin and accused her of being its owner. Her defence also included a claim that some third party or I parties living in one of the rooms in the house had escaped through the back door of the house when the police raided the house and that the heroin was most probably theirs.

In her evidence the accused said at about 9.30pm she heard someone knock at the door. She was then sleeping in the second room (room C). She heard Ah

Yoke, who was in the first room studying, call her and say, 'Auntie, someone is knocking at the door. Can you go and find out who they are?' She (the accused) then went to the front door and lifted the curtain at the door and asked, 'Who are you looking for?' and the person who knocked at the door said, 'Police.' She was asked to unlock the door. She then walked back to her room to fetch the key.

As she walked back three or four steps she heard the voice of one of the occupiers of room 5 (ie room F) ask, 'Who were they looking for?' She said she replied they were the police. According to the accused, the occupier (she identified him later as Mah Kau Chye) told her not to open the door and said, 'Maybe they are robbers.'

As she was about to enter her room the person who knocked at the door broke the glass of the door. She then rushed to her room and stood there. She said they took five minutes to break open the door. After that she heard 'footsteps going in and out of the house'. And it was quiet again. She came out to look for Ah Yoke and shouted for her but there was no response.

She then heard somebody at the back call her to go to the back and switch on the light. She walked towards the back portion towards the two toilets. She said one of them had no lights. She saw three persons in the toilet where there were lights. They told her to switch on the lights at the back ('buka belakang api'). She replied there were no lights at the back ('belakang ta'da api'). Then she said they asked her for the key and she said she did not have it with her ('kunci saya tak angkat').

She said that two of the persons walked to her and wanted to search her person and she told them, 'You are male and I am a female. For what reason (do) you want to search me?' She said that then one of them slapped her twice, on both sides of the face, and one of them caught hold of both her hands. The person who slapped her face then put his hand into her blouse pocket and took it out and then opened his hand and said, 'Ini pek hoon lu punya poket angkat punya.' She said she replied, 'Gua poket takda pek hoon.' She said that as he showed his hand she saw a package wrapped in newspaper and a chocolate coloured purse. After that they handcuffed her.

She continued her evidence saying that as one of the persons guarded her the other walked towards a third person. Of the latter two one of them had a torchlight and the other a metal object. Then both of them 'opened the back door'. She said that she did not know how they managed to open the door. The two of them went through the back door and about two minutes later they came back to the house and one of them held a pinkish plastic bag. The two of them then squatted in the area near the toilet where there was light and 'opened up the plastic bag'. She said that then the person who guarded

A her walked towards the two and one of the three said, 'Ini betul pek hoon, cukuplah.' They then asked her, 'Rumah lu punya?' and she replied she was renting a room there. And the three then walked to her room where they seized three bank account books and two purses containing \$1,600. (She said the two purses and the money were returned to her but not the account books.)

B She also said that the police searched a room where two males and a female lived. She said she did not know whether they were in the room but the three were with the police beside her when the police searched the room. C She said they were arrested by the police. After that they conducted a search in the fifth room (ie from F) and they came out with a yellow plastic bag from that room. She said room F was occupied by Mah Kau Chye and Ah Kuat. She also gave the names of the tenants in the other rooms.

D She said that subsequently the four of them, herself and the three others who had been arrested, were taken to the police station. She also said she made a cautioned statement.

E According to p 1 of the document containing the cautioned statement, it was made on 9 October 1984. The statement made by her after the caution was administered was barely one page. It substantially corroborated her evidence that while she was asleep she heard someone knocking at the door, that she went to the door and heard the police ask for the door to be opened, that she wanted to go and fetch the key when she heard voices from the end room telling her not to open the door as the person could be a robber and not the police, that she heard the glass of the door being broken, that she went inside her room, that she heard the police go to the back portion of the house, that the police called her to switch on the light at the back of the house, that the back had no light, that the police discovered a red bag at the back of the house and said the heroin (in the bag) belonged to her, that her room was searched and two purses and three bank account books were seized.

F The cautioned statement omitted mentioning about G H Ah Yoke, about the names of the tenants in the house, about her being slapped by a police officer, about her allegation of the feigned recovery of a newspaper package and a purse from her blouse pocket, about the discovery of a yellow plastic bag in room F by the police, about the arrest of three other persons at the scene, all of which she claimed in her examination-in-chief. She said she mentioned a lot of things to the police but they were left out. I She was not challenged on this.

As earlier stated, in her cautioned statement she related that she heard voices from the end room tell her not to open the door as the person (at the door) could be a robber and not the police. She also said that at that time

she heard the sound of someone opening the back door and running. In her examination-in-chief, however, she did not mention this. What she said was that she heard sounds of footsteps going in and out of the house. She said in reply to her counsel's question as to what had happened to the people at the end room, 'Don't know where they had gone. But I heard sounds of footsteps.'

In her examination-in-chief she said that after a police officer feigned recovery of the newspaper package and purse from her blouse pocket, two police officers went out of the back door and then about two minutes later they came back to the house and one of them showed her a pinkish plastic bag and said it was hers. She did not mention about her going or being brought through the back door to the back of the house. In her cautioned statement, however, she stated that the police brought her to the back of the house where the rubbish dump was and there she saw the police discover the plastic bag after which was brought into the house.

I now come to her testimony on vital matters under cross-examination.

She was not cross-examined on her testimony that there was a fixed curtain hanging over the door, which curtain she lifted to see who was knocking at the door. She had said the curtain was a fixed one, not one that could slide (meaning that it was one that could not be undrawn).

She was cross-examined on that point of the cautioned statement where she stated she heard someone open the back door and run whereas she did not so state that in her examination-in-chief. Her reply was that she heard the sound when she was in the room; she said, 'I was in the room and I did not see - maybe I left it out - all I heard were sounds.' She said she did hear somebody open the door and she did not know what door it was. After she gave this evidence she was asked about the chronological sequence of some events to which I shall come to later and she appeared confused and told the interpreter that she had not taken anything since dinner the previous night. In connection with this I have to state that her evidence was given before lunch break on Saturday, 28 May 1988, and she did appear confused. I also have to state that the case was adjourned for further hearing on Tuesday, 31 May 1988 (Monday, 30 May 1988, being a holiday). When she gave evidence on Tuesday in the morning she again stated she had not taken breakfast that morning (ie that Tuesday) too. Her explanation was that breakfast was normally supplied at between 7.30 to 8am but the 'black maria' picked her up by 7.30am and went to fetch other prisoners, arriving in the court premises at 8.45am and by 8.50am she was sitting in the court. My court starts at 9am.

I can believe her testimony that on the two mornings she did not have breakfast, her last meal being dinner

A given the previous day of each of the said mornings. It is possible she became confused as to the sequence relating to some facts as a result of having had no breakfast on the first morning she gave evidence.

I now come back to the cautioned statement again. The cautioned statement was translated to her from Malay into Cantonese in court when defence asked her if she had made the statement, and when asked whether the contents were correct by the deputy public prosecutor (DPP) she said she could not remember what the interpreter had explained to her earlier that morning. It was re-translated to her and she said the contents were correct. Several portions of the cautioned statement were read out to her again by the DPP and these portions showed some omissions when compared with her testimony. Her reply was that the recording officer left out some details. She was also asked when in point of time she heard the noise of somebody opening the back door and run as stated in the cautioned statement and she said she heard the sound when she was in the room. It was put to her that what she told the court about hearing the sound of footsteps and of glass being broken was not true. To this she replied, 'I only heard the footsteps going in and out - I was in the room. I did not see anything.' To me it appeared she did not understand the question and I intervened and asked why she did not state in court in evidence that she had heard somebody open the door and escape. She replied, 'Because I was in the room - I did not see - maybe I left it out - all I heard were sounds.' She then said she heard somebody F open a door but did not know which door.

She was then asked about the sequence of certain events as to which happened first - the police breaking the door, Mah speaking to her and 'the door being opened'. She said Mah telling her not to open the door was the first event. Then she went back to her room. G Then she heard the sound of the glass panel (being broken). The interpreter asked her about the third incident and it was at that time that she appeared confused and said she had not taken anything since dinner the previous night. My view is that the question put by the DPP did confuse the accused. My impression was that H she had misunderstood the question by the DPP relating to the 'door being opened'.

She was then asked if she went out of the house. She answered, 'No.' She then denied stating in her cautioned statement that the police brought her to the back of the house where there was a rubbish dump and that she saw I the police discover a plastic bag and that subsequently she was brought back inside the house and while inside the house the police informed her that the 'thing' was heroin and that it was hers. She said she did not state that in her cautioned statement and she also said she could not remember what she had told the court. When she was reminded that she had confirmed that what was read

from the cautioned statement was correct, she said that in respect of what the interpreter had explained to her – some parts were correct and some she could not remember. She said except for the relevant passages relating to her being brought outside the back of the house the rest were true. She added that regarding her testimony that one of the policemen slapped her the recording officer of the cautioned statement told her she did not have to tell him that but to tell it in court. In re-examination, however, she said she forgot to mention in court what she had stated in the cautioned statement that she was brought back to the house.

In considering the defence I have to look at the totality of all the evidence, both of the prosecution and the defence, with the undoubted blemishes which have appeared therein.

The first matter that strikes me is about the 'glass door' at the premises. There is no dispute that the glass panel was transparent. But the accused stated that there was a curtain over this door and from her description it was placed within the premises and fixed and could not be drawn. It was a casual piece of evidence and it was left unchallenged. During the prosecution's case I had noticed from photograph P28A that the door, with the glass panel obviously replaced, appeared to be opaque but when I asked Inspector Mohd Yusof about it he said that the flash of the camera could have caused reflection on the glass. But then he was not the photographer. There appeared to be patterns on the glass or a curtain behind it and I allowed the DPP to ask him about that. Inspector Mohd Yusof said there was no curtain on that day. In the light of the accused's evidence, however, that she had lifted the curtain to see who was at the door, I re-scrutinized photograph P28A and it does appear from the photograph that there is an opacity with irregular patterns like the folds of a curtain from top to bottom; to the right of the glass between this opacity and the frame of the door is a thin line gap of glass showing that the opacity does not cover the door completely. To my mind there is indeed a curtain behind the door. I realize that the photograph was taken on the morning of 11 February 1985, some four months after the arrest of the accused. But it seems to me too obvious – it is a matter of common sense and experience – that privacy of one's premises is sought for by everybody especially at night and what more common place thing would one have for a door with a transparent glass panel to ensure such privacy than an ordinary curtain? So to my mind her evidence that there was a curtain hanging over the door is believable.

With that in mind, though not solely so, several matters of the prosecution's case which I said, before I called the accused to make her defence, would need re-evaluation in the light of the defence, would need to be re-stated and evaluated.

A I am concerned about the evidence relating to the sketch plan. No reason was proffered as to why it was drawn up some three months after the arrest of the accused. The IO only visited the scene of the arrest on 15 January 1985. He visited the scene together with Khabri who had effected the arrest of the accused. Khabri had stated that he pointed to the IO, PW1, the place where the accused was arrested and he also showed the IO the place where the accused had come from and where she had run to. The IO himself said Khabri pinpointed various spots where photographs were taken (which curiously were taken about one month after the IO visited the scene) but denied that Khabri pointed out the movements of the accused. Could it be that Khabri never saw the woman's movements through the glass because there was a curtain hanging over the door? And was that why there were so many other unsatisfactory features in his evidence and the evidence of Inspector Yusof?

D Now 'X' was marked near the kitchen in the sketch plan and this point 'X' was pointed out by Khabri and Inspector Mohd Yusof to have been the place where the accused was arrested. Why was no photograph taken of this place? Instead the photographs showed the rubbish chute, and the rubbish chute, it is in evidence, is near the two toilets. And it is the evidence of the accused that the police were near the toilet when they called her out of the room. Having confidently identified the point 'X' as the place of arrest, Inspector Mohd Yusof again confidently and clearly replied under cross-examination, 'I arrested her at the place marked 'X' in the sketch.'

F Khabri under cross-examination was asked, 'Who showed the point 'X'?' He replied, 'I brought Inspector Razali, the IO, to the scene and I pointed out the place where the accused was arrested.' However, when he was shown photographs P28B, C, D and E he had to agree that none of them showed the place marked 'X', the place where the accused was arrested. He then instead marked the place of arrest in P28C which shows the corridor leading to the rubbish chute, not the kitchen. And he said, 'Sketch plan is wrong – from the front door one can see directly to the place where the accused was arrested.' I find these discrepancies in the light of the defence troubling.

H I have re-scrutinized the police report (P25) made by Inspector Yusof in respect of the arrest. In the report he stated that he together with a police party raided premises No 71, Jalan Berangan. He stated in his report:

I Saya telah mengetuk pintu dan dihipir oleh seorang perempuan cina. Apabila saya kenalkan diri saya polis perempuan cina tersebut terus berlari ke bahagian belakang dan mengambil sesuatu. Saya mengarahkan DPC 63205 untuk memecahkan pintu cermin rumah itu dan mengejar perempuan cina itu.

According to the above he had seen the woman run to the back and pick something and then he directed DPC

63025 to break the glass panel on the door after which he chased the woman. It will be noted that no mention was made of the woman coming out of a room or of her going back to the same room – only that she picked something. His evidence in court was that when he knocked at the door he saw the accused come out of room F and approach the door and when he identified himself as the police she turned back and ran towards the back portion of the house. It was Khabri who said that while the glass was being broken he kept the woman under observation and he saw her go to room F and come out with something in her hand. Inspector Mohd Yusof's explanation for his report where it is made to appear that he observed the woman run to the back and pick something up and then only he ordered the glass panel to be broken down was that the report was a composite report of what he and others observed. But in the light of the defence was it really a composite report? If it was really such a composite report then why is the sequence of events not in accordance with the testimony of himself and Khabri. It was only after the woman had run to the back and picked up something that he ordered DPC 63025 to break open the glass panel, according to the police report. But Khabri said that while the glass panel was being broken he observed the accused run to room F and then go out with something in her hand. After re-scrutiny of the police report and the evidence on the same matter, I find I do need to be cautious not only with this aspect of the evidence but the whole of the evidence bearing in mind too that the evidence of the accused was that she came out of her bedroom, room C, went to the door, lifted the curtain to the door and went back to the room to fetch the key when she was told by May not to open the door whereupon the police broke the glass panel. I have to bear in mind that the IO did not indicate in the sketch plan the movement of the accused as originating from room F but as originating from indeed her own bedroom, room C. And Khabri's evidence was that he told the IO the movements of the woman. It is true the IO did not mark her as going back to her bedroom but as going straight to the back. But does not the police report say she ran to the back portion of the premises, there being no mention of her going to a room in a supposedly composite police report?

I also find it strange that there was a photograph showing the inside of the bedroom of the accused but no photograph of the inside of room F where the accused had allegedly entered and taken the drugs.

The accused's story that the police discovered the red bags outside the premises at the back must also be seen in the light of the sketch plan. Curiously, the sketch plan shows dotted lines indicating the backyard of the house and the length and width of this backyard are indicated as 14 ft and 6 or 7 ft respectively. Although the plan was not to scale, why was the backyard marked and

A marked with their approximate measurements? Was it because he had been informed of the importance of the backyard? Was not the red bag containing heroin really found there?

B One other aspect. As the IO, PW1 must have read the cautioned statement of the accused and realized that the accused had stated that there were tenants in room F, that the voice telling the woman not to open this door came from this room. In her evidence the accused said that the tenants of this room were Mah Kau Chye and Ah Kuat. Her evidence was that Mah Kau Chye told her not to open the door. There was no evidence that PW1 contacted the landlord to find out about these two persons. In any event nobody came to give evidence as to whether the room was not occupied by anybody. There was only the opinion of Inspector Mohd Yusof that it was a store but he said there was a bed there. If indeed two persons were occupying the room would the accused have come out of that room which was not hers?

E Could it be that indeed there was a Mah Kau Chye and an Ah Kuat who occupied room F, that Mah told the accused not to open the door, that they escaped through the back, that they carried the red plastic bag, the newspaper package and purse containing heroin, that the newspaper package and purse were dropped, because of the rush to escape, inside the premises at the back, that the red plastic bag was abandoned at the back outside the premises? There is discrepancy in the accused's evidence vis-à-vis her cautioned statement about whether she was brought outside the premises – that is about the only serious discrepancy – but she said she was confused and she did appear confused as I have earlier stated – could it be true that the red bag was found outside and that the purse and newspaper package being discovered inside were pinned on her? Inspector Mohd Yusof said that the back door was locked but why did the IO pay great attention to the backyard? It was after all Khabri the arresting officer who accompanied him to the scene and he could have indicated to him that the backyard was important enough to be included in the sketch plan with all those measurements as to its length and width.

H To sum up. The investigations in this case have been most unsatisfactorily conducted and the DPP indeed conceded that the investigations by the IO were not up to the mark. The blemishes in the prosecution's case have become accentuated, and more blemishes have been revealed, in the light of the totality of the evidence. The evidence of PW4 and PW5 with their inherent inconsistencies and their inconsistencies when viewed against the police report, the sketch plan, the evidence of the IO and the defence leave me in a state of doubt as to what actually took place that night. The cardinal principle enshrined in the law of our country is that the onus of proving guilt of an accused is throughout on the prosecution and if upon the whole evidence the court is left in a

real state of doubt, the prosecution has failed to satisfy the onus of proof which is upon it (see *Mat v PP*²). To my mind, the accused has succeeded in raising a reasonable doubt on the prosecution's story that she was in possession of the drugs. In the event, I do not have to consider the rebuttable presumptions raised under s 37(d) and (da) of the Dangerous Drugs Act 1952. Accordingly, I acquit her of the charge.

Order accordingly.

Solicitors: *Khairuddin & Associates.*

Reported by *PS Ranjan*

Public Prosecutor v Kamde bin Raspani

HIGH COURT (JOHORE BAHRU) – CRIMINAL TRIAL NO 17
OF 1984
ZAKARIA YATIM J
10 APRIL 1988

Criminal Procedure – Cautioned statements – Admissibility – Caution ambiguous in meaning – Recording of statements – Use of interpreter – Exact words of accused not recorded – Statements not interpreted to him after recording – Voluntariness of statements – Accused interrogated for long hours at night in breach of rules – Allegation by accused of assault of police – Burden on prosecution at close of case – Prima facie case

Evidence – Cautioned statements – Admissibility – Caution ambiguous in meaning – Recording of statements – Use of interpreter – Exact words of accused not recorded – Statements not interpreted to him after recording – Voluntariness of statements – Accused interrogated for long hours at night in breach of rules – Allegation by accused of assault by police – Evidence of accomplice – Need for corroboration – Circumstantial evidence

The accused was charged under the Dangerous Drugs Act 1952 with the offence of cultivating cannabis. The prosecution relied largely on two cautioned statements made by the accused and the evidence of one Sumari bin Saribu (PW11) who had been arrested near the scene of the crime. In his evidence, Sumari had named the accused.

The defence objected to the admissibility of the cautioned statements. The police inspector who administered the caution admitted that in the caution he administered, which was translated into simple Malay, there was no comma after the word 'tidak'. The inspector had experienced difficulty in understanding the accused because of the accused's Javanese accent and so he called another inspector to act as interpreter. The statements were recorded in Malay. The recording officer also admitted that he had recorded the words of the interpreter and not the words of the accused. He had read back the statements to the accused but they were not interpreted to the accused.

In addition, the accused had been subjected to long hours of interrogation. He was once interrogated for 17½ hours until the early hours of the morning in breach of the Police (Lock Up) Rules 1953 which provides that prisoners shall be locked

up for the night by 6.30 pm and shall rise and be dressed by 6.30 am. The accused had also alleged that he had been beaten during interrogation and that he had fabricated his statement to avoid further beating. The police witnesses admitted that there was opportunity to beat the accused. Sumari too alleged that he had been assaulted by the police after his arrest and that the police had uttered threats to him.

B Held, acquitting and discharging the accused: (1) For the statements to be admissible, the prosecution must prove beyond reasonable doubt that the statements were made voluntarily without any inducement, threat or promise. It is the duty of the prosecution to prove affirmatively to the satisfaction of the court that the statements were made voluntarily and not obtained by any improper means.

(2) Without the comma, the caution could mean two things. It could mean that what the accused said could be used in evidence or that it could not be used in evidence against him. Therefore, the caution itself was very ambiguous, especially so when the caution had to be translated into simple Malay for the accused.

(3) It was doubtful whether the statements were recorded in a proper manner. The words in the cautioned statements were not the words of the accused. Furthermore, the statements were not interpreted back to him. For this reason, the cautioned statements were inadmissible.

(4) The way the accused was interrogated was indeed unfair and the court must regard it as oppressive. In addition, there was a strong probability that the accused was assaulted after which he agreed to make a statement. The court had no hesitation in coming to the conclusion that the accused was put under tremendous physical and mental pressure in order to compel him to make the statements. The statements were inadmissible because the court was fully satisfied that the statements were not made voluntarily. The court was also satisfied that the statements were not made without coercion or threat.

(5) When the prosecution closed their case, there was no evidence at all to link the accused with the cultivation of the plants or with the exhibits. The only evidence was the evidence of Sumari. Assuming that he was not under pressure to give the evidence, he had been found and arrested at the scene and was therefore an accomplice and his evidence was not corroborated by anyone in the sense that the plants belonged to the accused or the plants were cultivated by the accused. Neither was there circumstantial evidence which pointed to the guilt of the accused.

(6) The prosecution, at the close of their case, need not prove their case beyond reasonable doubt. All that they needed to show was that there was some credible evidence to link the accused with the offence with which he was charged. There must be some evidence which is not inherently incredible. In this case, there was no evidence at all to link the accused with the cultivation of the plants or with the exhibits. There was therefore no prima facie case against the accused.

Cases referred to

- 1 *Dato Mokhtar bin Hashim v PP* [1983] 2 MLJ 232 (folld)
- 2 *PP v Singaran* Kedah Criminal Trial No 11 of 1974 (unreported) (folld)
- 3 *PP v Seman bin Misbah* Criminal Trial 4 of 1983 (unreported) (folld)
- 4 *PP v Akin Khan bin Abdul Khanan* [1987] 2 CLJ 244 (folld)
- 5 *Haw Tua Tau v PP* [1981] 2 MLJ 49 (folld)

**A Pathmanabhan a/l Nalliannan v Public Prosecutor and other
appeals**

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS
05–277–12 OF 2015(B), 05–281–12 OF 2015(B), 05–278–12 OF
2015(B) AND 05–280–12 OF 2015(B)
ARIFIN ZAKARIA CHIEF JUSTICE, RICHARD MALANJUM CJ
(SABAH AND SARAWAK), SURIYADI, AZAHAR MOHAMED AND
C ZAHARAH IBRAHIM FCJJ
16 MARCH 2017

D *Criminal Procedure — Defence — Alibi — Whether alibi defence unproven
— Whether testimonies of all four accused undermined credibility of first accused's
alibi defence — Whether witness whom first accused met on night of murders
testified they met well past time stated in murder charges — Whether first accused
unable to prove where he was during time stated in charges — Whether
prosecution's evidence of motive for murders of no probative value — Whether
E totality of circumstantial evidence overwhelmingly proved first, second and fourth
accused committed murders pursuant to pre-arranged plan*

F *Evidence — Expert evidence — Chemist's evidence — Chemist testified DNA
analysis of blood taken from cricket bat, walls of building and zinc sheets matched
DNA of three victims of murders — Whether chemist's evidence and his report
inadmissible as hearsay as some of DNA tests done by his assistants who were not
called to testify — Whether prosecution not required to call every laboratory officer
assigned and supervised by chemist to carry out tests upon which chemist's report was
G based — Whether defence did not challenge reliability of any of tests done by
chemist and his assistants nor produced own expert evidence in rebuttal*

H *Evidence — Impeachment — Credibility of witness — Accused applied to
impeach credibility of police witness under s 155(c) of the Evidence Act 1950 ('the
EA') on ground his evidence in court contradicted his previous police reports
— Testimony of witness concerned 'discovery information' given by accused persons
under s 27 of the EA and evidence of their conduct (in pointing out location of
incriminating items) under s 8 of the EA — Whether use of word 'statement' in
s 155(c) meant both first information reports under s 107(1) of the Criminal
I Procedure Code and other police reports made after investigations commenced could
be used to impeach witness under s 155(c) read together with s 145(1) of the EA
— Whether discrepancies between police officer's court testimony and his previous
police reports minor and not material enough to warrant impeachment of
credibility*

Evidence — Information leading to fact discovered — Evidence Act 1950 s 27 — Police officer testified information given by two accused persons led to discovery of items connected with murders — Whether Court of Appeal wrongly rejected s 27 evidence on ground information given was based on joint statement of more than one accused person — Whether s 27 evidence admissible as accused persons gave information individually although they were questioned jointly — Whether evidence of conduct of accused persons pointing out to police places where incriminating items were found relevant and admissible under s 8 of the Evidence Act 1950

Each of the four appellants herein was charged in the High Court with the murder of four persons at a farm belonging to one of the appellants, Pathmanabhan a/l Nalliannan ('Pathma'), a lawyer. The three other appellants, Thillaiyallagan a/l Thanasagaran ('Thillai'), Matan a/l Ravichandran ('Matan') and Kathavarayan a/l Rajodorai ('Kathavarayan') were Pathma's employees on the farm. Each appellant was charged with committing, in furtherance of their common intention, the murders of Pathma's client and business partner ('Sosilawati'), her driver ('Kamal'), a banker ('Hisham') and another lawyer ('Kamil') (collectively referred to as 'Sosilawati and the three others') between 8.30–9.45pm on 30 August 2010. After a full trial, the High Court convicted all the appellants and sentenced them to death, ruling that they had failed to cast a reasonable doubt on the prosecution's case. Their appeals to the Court of Appeal ('the COA') against conviction and sentence failed. The appellants were found guilty entirely on circumstantial evidence as none of victims' bodies was ever found; neither did any witness testify to having seen the dead bodies of Sosilawati and the three others or of having seen them being inflicted with injuries that caused their deaths. Through direct evidence from family members and friends of the victims and a maid ('SP33') who worked at the farm, coupled with mobile telephone call detail records and forensic and DNA evidence, the prosecution proved that Sosilawati and the three others were present at the farm on the day and time in question. SP33 testified that a day before the day in question she saw logs being unloaded from a lorry at the farm and preparations being made for the arrival of guests; that on the night in question she had heard screams and later saw a huge fire at the rear portion of the farm grounds. Upon their arrest, Thillai and Kathavarayan led police to the discovery of the cars Sosilawati and the three others had used (which were separately abandoned at two different locations), various personal effects of Kamal, Hisham and Kamil which had been discarded in nearby rivers as well as burnt logs and burnt zinc sheets from places where they had been thrown away. From the farm premises, police recovered a blood-stained cricket bat and took swabs from blood-stained walls. A burn site on the ground at the rear portion of the farm when dug revealed charred fragments of bone, believed to be human, but no conclusive DNA tests on them could be performed because of their condition. DNA analysis of the blood found on the cricket bat and the walls, however, showed that they belonged to Hisham while the blood stains on

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- A the zinc sheets belonged to Kamal and Kamil. Sosilawati's DNA was never found on any item, yet the COA held that in all probability, based on inferences drawn from the facts and circumstances of the case, she, too, must have been killed by the appellants. The courts below rejected Pathma's sole, and unproven, defence of alibi because the testimonies of his co-accused in respect of that defence conflicted and also because the person ('SP61') whom Pathma said he went to meet at a hotel during the time stated in the charges testified that he only met Pathma after 10pm on the day in question. At the trial, the appellants sought to impeach the credibility of SP32, the police officer who testified that information given by Thillai and Kathavarayan and another person led him and his team to various spots inside and outside the farm where numerous incriminating items were discovered. The impeachment move was based on alleged material contradictions between SP32's testimony in court and what he had stated in several police reports. Holding that there were no such material contradictions, the trial court dismissed the impeachment attempt. The COA, however, held that there were material contradictions and that 'discovery information' under s 27 of the Evidence Act 1950 ('the EA') was wrongly admitted because the information given by Thillai, Kathavarayan and another person was given to police jointly and not individually. Nevertheless, the COA held that evidence of the accused persons pointing to where the incriminating items were found was admissible under s 8 of the EA. In the instant appeal, the appellants argued that SP32's evidence should have been wholly rejected and that the dismissal of their impeachment application was wrong. The appellants also argued that the DNA evidence in this case should not have been admitted because it was hearsay as the chemist ('SP86') who testified did not personally perform the entire DNA analysis but had also relied upon other tests done by his assistants, none of whom was called to testify at the trial.
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- G **Held**, allowing Matan's appeal, setting aside his conviction and sentence and acquitting and discharging him of the charges; dismissing the appeals of the other three appellants and affirming their convictions and sentences:
- H (1) There was overwhelming evidence before the court to show that Sosilawati and the three others were murdered at the farm within the time and on the date stated in the charges and that their murders were committed by the first, second and fourth accused persons acting with common intention pursuant to a pre-arranged plan. The totality of the evidence was that the bodies of Sosilawati and the three others were completely incinerated with the use of the logs and zinc sheets in order to disassociate them with the farm, and by extension, with the first, second and fourth accused persons. On the evidence, the prosecution had succeeded in proving its case beyond reasonable doubt as against the first, second and fourth accused persons on all the four charges (see paras 247–248(d), (g), (m)(i) & 251).
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- (2) There was insufficient evidence to implicate the third accused (Matan) in the murder of Sosilawati and the three others as charged. The third accused was just a farm worker. The evidence connecting him to the incident were: (a) he was seen by SP33 unloading logs at the farm a day before the day in question; and (b) he was seen by SP59 at the farm at 10pm on the day in question. It was unsafe to rely on the evidence of SP59 who was rightly declared hostile by the trial judge. Apart from that, there was no evidence of conduct under s 8 of the EA and no evidence to show that he was involved in the discovery of the items under s 27 of the EA. As such, the trial judge erred in calling upon the third accused to enter upon his defence at the close of the prosecution's case (see para 252). A B C
- (3) At the end of the prosecution's case, the combined weight of the evidence led to only one conclusion — that Sosilawati and the three others must have met their untimely ends at the farm at the time stated in the charges at the hands of the first, second and fourth accused persons. The defence's evidence failed to raise any reasonable doubt on the prosecution's case. The first accused's defence was a mere denial and one of alibi. His alibi defence had no merit. There was no reason to disagree with the factual findings made by the courts below on the defence of alibi. The second accused merely said nothing happened at the farm on the day in question while the fourth accused in his defence merely testified that he saw Sosilawati and the three others being beaten up but completely denied his involvement (see paras 68–69 & 249–250). D E
- (4) The Court of Appeal was wrong to hold that there were material discrepancies between SP32's evidence in court and his police reports. On the facts, there were no material discrepancies and, therefore, no basis to impeach SP32's credibility. There was no reason to disagree with the trial court's finding that SP32 was a credible witness. Hence, his evidence pertaining to the discovery information under s 27 of the EA and evidence of conduct under s 8 of the same Act were credible and reliable (see paras 96 & 101). F G
- (5) There was no evidence of a joint statement having been made by the second and fourth accused persons. The trial judge found that the information, which led to the discovery, was given individually although the accused persons were questioned jointly. The alleged 'joint statement' issue had to be rejected. As the second and fourth accused had given information separately to SP32 and had led police to areas near the farm where items connected to the murder were discovered, the statement which led to the discovery was accurate. Accordingly, contrary to the finding of the Court of Appeal, the s 27 evidence was admissible (see paras 117–118 & 120). H I
- (6) There was no basis to say the findings and testimony of SP86, and his report ('P600'), should not have been admitted on the ground of being

- A hearsay evidence. P600 was a scientific report by SP86, an unchallenged expert, derived from his examination, analysis and interpretation of the test results and data secured by his officers directly under his supervision. There was no necessity for the prosecution to have called each and every laboratory officer assigned and supervised by SP86 to carry out the required tests upon which P600 was premised. The crucial part was the examination, analysis and interpretation of those test results and data carried out by SP86 in producing P600. No challenge was made on the method adopted by SP86. At the trial, there was no allegation of unreliability of any of the test results and data secured by the laboratory officers. No rebuttal expert was called by the appellants to challenge the test results and data interpreted by SP86 (see paras 145–146).
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- (7) The evidence of motive (for the murders) as adduced by the prosecution was far from being satisfactory and far too equivocal to be of any value (see para 166).
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[Bahasa Malaysia summary]

- Setiap daripada empat perayu telah dituduh di Mahkamah Tinggi kerana membunuh empat orang di ladang milik salah seorang daripada perayu tersebut, Pathmanabhan a/l Nalliannan ('Pathma'), seorang peguam. Tiga perayu yang lain, Thillaiyallagan a/l Thanasagaran ('Thillai'), Matan a/l Ravichandran ('Matan') dan Kathavarayan a/l Rajodorai ('Kathavarayan') merupakan pekerja Pathma di ladang tersebut. Setiap perayu telah dituduh melakukan, dalam melaksanakan niat bersama mereka, pembunuhan anak guam dan rakan kongsi perniagaan Pathma ('Sosilawati'), pemandunya ('Kamal'), pegawai bank ('Hisham') dan seorang peguam lagi ('Kamil') (dirujuk secara kolektif sebagai 'Sosilawati dan tiga yang lain') antara pukul 8.30–9.45 malam pada 30 Ogos 2010. Selepas perbicaraan penuh, Mahkamah Tinggi telah mensabitkan semua perayu dan menjatuhkan hukuman mati ke atas mereka, dengan memutuskan bahawa mereka telah gagal untuk menimbulkan keraguan munasabah ke atas kes pendakwaan. Rayuan-rayuan mereka kepada Mahkamah Rayuan ('MR') terhadap sabitan dan hukuman telah gagal. Perayu-perayu didapati bersalah secara keseluruhan atas keterangan mengikut keadaan kerana tiada mayat mangsa telah ditemui; mahupun mana-mana saksi telah memberi keterangan telah melihat mayat Sosilawati dan tiga yang lain atau telah melihat mereka diceredakan sehingga menyebabkan kematian mereka. Melalui keterangan secara langsung daripada ahli keluarga dan rakan mangsa dan seorang pembantu rumah ('SP33') yang bekerja di ladang tersebut, bersama rekod butiran panggilan telefon bimbit dan keterangan DNA dan forensik, pendakwaan telah membuktikan bahawa Sosilawati dan tiga yang lain berada di ladang tersebut pada hari dan masa yang dipersoalkan. SP33 telah memberi keterangan bahawa sehari sebelum hari yang dipersoalkan dia telah melihat kayu balak diturunkan daripada sebuah lori di ladang itu dan persediaan telah dibuat untuk menyambut tetamu;
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bahawa pada malam yang dipersoalkan dia telah mendengar jeritan dan kemudian melihat api yang besar di bahagian tepi kawasan ladang itu. Setelah mereka ditangkap, Thillai dan Kathavarayan telah membawa polis untuk menjumpai kereta-kereta yang telah digunakan oleh Sosilawati dan tiga yang lain (yang telah ditinggalkan berasingan di dua lokasi berbeza), pelbagai barang peribadi Kamal, Hisham dan Kamil yang telah dibuang di sungai-sungai berdekatan dan juga kayu balak terbakar dan kepingan zink yang terbakar dari tempat-tempat di mana ia telah dibuang. Dari premis ladang itu, polis menemui kayu kriket yang mempunyai kesan darah dan mengambil calitan daripada dinding yang mempunyai kesan darah. Satu tapak membakar atas tanah di bahagian tepi ladang itu apabila digali dijumpai serpihan tulang hangus, dipercayai tulang manusia, tetapi tiada ujian DNA yang muktamad ke atasnya boleh dilakukan kerana keadaannya. Analisis DNA darah yang dijumpai pada kayu kriket dan dinding itu, walaubagaimanapun, menunjukkan bahawa ia adalah milik Hisham manakala kesan darah pada kepingan zink adalah milik Kamal dan Kamil. DNA Sosilawati tidak pernah dijumpai pada mana-mana barangan tersebut, namun MR telah memutuskan bahawa dalam semua kebarangkalian, berdasarkan inferens yang dibuat daripada fakta dan keadaan kes, dia, juga, mungkin telah dibunuh oleh perayu-perayu. Mahkamah bawahan menolak satu-satunya pembelaan alibi Pathma yang tidak boleh dibuktikan kerana keterangan-keterangan tertuduh bersamanya berkaitan pembelaan tersebut adalah bertentangan dan juga kerana orang itu ('SP61') yang mana dikatakan oleh Pathma telah ditemuinya di sebuah hotel pada masa yang dinyatakan dalam pertuduhan-pertuduhan itu telah memberi keterangan bahawa dia hanya berjumpa dengan Pathma selepas 10 malam pada hari yang dipersoalkan. Pada perbicaraan itu, perayu-perayu memohon untuk mencabar kebolehpercayaan SP32, pegawai polis yang memberi keterangan bahawa maklumat yang diberikan oleh Thillai dan Kathavarayan dan seorang lain yang membawanya dan pasukannya ke pelbagai tempat di dalam dan di luar ladang tersebut di mana banyak barangan yang menuduh itu telah dijumpai. Langkah pencabaran adalah berdasarkan percanggahan material yang dikatakan antara keterangan SP32 di mahkamah dan apa yang telah dinyatakan olehnya dalam beberapa laporan polis. Dengan memutuskan bahawa tidak ada percanggahan material yang sedemikian, mahkamah perbicaraan telah menolak percubaan untuk mencabar itu. MR, bagaimanapun, telah memutuskan bahawa terdapat percanggahan material dan bahawa 'discovery information' di bawah s 27 Akta Keterangan 1950 ('Akta tersebut') telah diterima dengan salah kerana maklumat yang diberikan oleh Thillai, Kathavarayan dan seorang yang lain telah diberikan kepada polis secara bersama dan bukan secara individu. Walau apa pun, MR telah memutuskan bahawa keterangan orang-orang tertuduh menuding kepada di mana barangan yang menuduh itu dijumpai adalah boleh diterima di bawah s 8 Akta tersebut. Dalam rayuan ini, perayu-perayu berhujah bahawa keterangan SP32 patut ditolak secara keseluruhan dan bahawa penolakan permohonan pencabaran mereka adalah salah. Perayu-perayu juga berhujah

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- A bahawa keterangan DNA dalam kes ini tidak patut diterima kerana ia adalah
dengar cakap disebabkan ahli kimia ('SP86') yang memberi keterangan tidak
secara sendiri melaksanakan keseluruhan analisis DNA tetapi juga telah
bergantung kepada ujian-ujian lain yng dilakukan oleh
pembantu-pembantunya, yang mana tidak seorang pun dipanggil untuk
B memberi keterangan semasa perbicaraan itu.

Diputuskan, membenarkan rayuan Matan, mengetepikan sabitan dan
hukuman dan melepas dan membebaskannya daripada
pertuduhan-pertuduhan; menolak rayuan-rayuan ketiga-tiga perayu lain dan
C mengesahkan sabitan dan hukuman mereka:

- (1) Terdapat banyak keterangan di hadapan mahkamah untuk
menunjukkan bahawa Sosilawati dan tiga yang lain itu telah dibunuh di
ladang tersebut dalam tempoh masa dan pada tarikh yang dinyatakan
dalam pertuduhan-pertuduhan itu dan bahawa pembunuhan mereka
D telah dilakukan oleh orang-orang tertuduh pertama, kedua dan keempat
yang bertindak dengan niat bersama berikutan satu rancangan yang telah
diatur terlebih dahulu. Keseluruhan keterangan adalah bahawa
mayat-mayat Sosilawati dan tiga yang lain itu telah terbakar sepenuhnya
E dengan menggunakan kayu balak dan kepingan zink untuk tidak
mengaitkan mereka dengan ladang tersebut, dan melalui lanjutan,
dengan orang-orang tertuduh pertama, kedua dan keempat. Berdasarkan
keterangan, pendakwa telah berjaya membuktikan kesnya melampaui
keraguan munasabah terhadap orang-orang tertuduh pertama, kedua
F dan keempat atas semua empat pertuduhan (lihat perenggan
247–248(d), (g), (m)(i) & 251).
- (2) Terdapat keterangan yang tidak mencukupi untuk mengaitkan tertuduh
ketiga (Matan) dalam pembunuhan Sosilawati dan tiga orang lain
sepertimana dituduh. Tertuduh ketiga hanya pekerja ladang. Keterangan
G yang mengaitkannya dengan kejadian tersebut adalah: (a) dia dilihat oleh
SP33 menurunkan kayu balak di ladang itu sehari sebelum hari yang
dipersoalkan; dan (b) dia dilihat oleh SP59 di ladang itu pada pukul 10
malam pada hari yang dipersoalkan. Ia tidak selamat untuk bergantung
kepada keterangan SP59 yang wajar diisytiharkan musuh oleh hakim
H perbicaraan. Selain daripada itu, tiada keterangan tentang perlakuan di
bawah s 8 Akta tersebut dan tiada keterangan untuk menunjukkan
bahawa dia terlibat dalam penemuan barangan di bawah s 27 Akta
tersebut. Oleh itu, hakim perbicaraan terkhilaf kerana memanggil
I tertuduh ketiga untuk memasuki pembelaannya di penutup kes
pendakwa (lihat perenggan 252).
- (3) Di akhir kes pendakwa, gabungan beban keterangan membawa
kepada hanya satu kesimpulan — bahawa Sosilawati dan tiga yang lain
telah menemui pengakhiran mereka yang tidak diduga di ladang tersebut

pada masa yang dinyatakan dalam pertuduhan-pertuduhan itu di tangan orang-orang tertuduh pertama, kedua dan keempat. Keterangan tertuduh pertama hanya penafian dan bukan alibi. Alibi pembelaannya tidak mempunyai merit. Tiada sebab untuk tidak bersetuju dengan penemuan faktual yang dibuat oleh mahkamah bawahan berhubung pembelaan alibi. Tertuduh kedua hanya menyatakan bahawa tiada apa yang berlaku di ladang tersebut pada hari yang dipersoalkan manakala tertuduh keempat dalam pembelaannya hanya memberi keterangan bahawa dia melihat Sosilawati dan tiga yang lain dipukul tetapi menafikan sepenuhnya yang dia terlibat (lihat perenggan 68–69 & 249–250).

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- (4) Mahkamah Rayuan adalah salah untuk memutuskan bahawa terdapat percanggahan material antara keterangan SP32 di mahkamah dan laporan polis. Berdasarkan fakta itu, tidak terdapat percanggahan material dan, oleh demikian, tiada asas untuk mencabar kebolehpercayaan SP32. Tiada sebab untuk tidak bersetuju dengan penemuan mahkamah perbicaraan bahawa SP32 adalah saksi yang boleh dipercayai. Justeru, keterangannya berkaitan penzahiran maklumat di bawah s 27 Akta tersebut dan keterangan tentang perlakuan di bawah s 8 Akta sama adalah berwibawa dan boleh dipercayai (lihat perenggan 96 & 101).

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- (5) Tidak terdapat keterangan berhubung kenyataan bersama yang telah dibuat oleh orang-orang tertuduh kedua dan keempat. Hakim perbicaraan mendapati bahawa maklumat itu, yang membawa kepada penzahiran itu, telah diberikan secara individu meskipun orang-orang tertuduh telah dipersoalkan secara bersama. Isu ‘joint statement’ yang dikatakan itu telah ditolak. Oleh kerana tertuduh kedua dan keempat telah memberikan maklumat secara berasingan kepada SP32 dan telah membawa polis ke kawasan berdekatan ladang itu di mana barangan yang berkait dengan pembunuhan itu ditemui, kenyataan yang membawa kepada penemuan itu adalah tepat. Sewajarnya, bercanggah dengan penemuan Mahkamah Rayuan, keterangan s 27 boleh diterima (lihat perenggan 117–118 & 120).

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- (6) Tiada asas untuk mengatakan penemuan dan keterangan SP86, dan laporannya (‘P600’), tidak patut diterima atas alasan ia merupakan keterangan dengar cakap. P600 adalah laporan saintifik oleh SP86, pakar yang tidak dicabar, yang diperolehi daripada pemeriksaan, analisis dan pentafsirannya berhubung keputusan ujian dan data yang dijamin oleh pegawai-pegawainya secara langsung di bawah penyeliaannya. Tiada keperluan untuk pendakwaan memanggil setiap dan semua pegawai makmal yang diberi tugas dan diselia oleh SP86 untuk melakukan ujian-ujian yang dikehendaki di mana P600 telah diasaskan. Bahagian penting adalah pemeriksaan, analisis dan pentafsiran keputusan ujian

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- A dan data tersebut yang dilakukan oleh SP86 dalam menghasikan P600. Tiada cabaran telah dibuat atas kaedah yang diguna pakai oleh SP86. Semasa perbicaraan, tiada pengataan tentang ketidakbolehpercayaan mana-mana keputusan ujian dan data yang dijamin oleh pegawai-pegawai makmal itu. Tiada pakar pematahan telah dipanggil oleh perayu-perayu untuk mencabar keputusan ujian dan data yang ditafsirkan oleh SP86 (lihat perenggan 145–146).
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- (7) Keterangan berhubung motif (untuk pembunuhan tersebut) sepertimana dikemukakan oleh pendakwa jauh daripada memuaskan dan terlalu samar untuk mempunyai apa-apa nilai (lihat perenggan 166).]
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Notes

- D For a case on credibility of witness, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 2350.
For cases on alibi, see 5(2) *Mallal's Digest* (5th Ed, 2015) paras 2060–2095.
For cases on chemist's evidence, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1921–1932.
- E For cases on Evidence Act 1950 s 27, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2415–2417.

Cases referred to

- Abdul Samid bin Edward v PP* [2015] 4 MLJ 58; [2015] 4 CLJ 149, CA (folld)
- F *Ahmad Najib bin Aris v PP* [2007] 2 MLJ 505; [2007] 2 CLJ 229, CA (refd)
Amathevelli a/p P Ramasamy v PP [2009] 2 MLJ 367; [2009] 3 CLJ 109, FC (refd)
Atley v State of Uttar Pradesh AIR 1955 SC 807, SC (folld)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (folld)
- G *Bhikari Behera v State of Orissa* 1995 CriLJ 2998, HC (refd)
Chan Chwen Kong v PP [1962] 1 MLJ 307, CA (refd)
Chong Soon Koy v PP [1977] 2 MLJ 78, FC (refd)
Dato' Seri Anwar bin Ibrahim v PP and another appeal [2015] 2 MLJ 293; [2015] 2 CLJ 145, FC (folld)
- H *Duis Akim & Ors v PP* [2014] 1 MLJ 49, FC (refd)
Francis Antonysamy v PP [2005] 3 MLJ 389, FC (refd)
Govind Krishna Jadhav v State of Maharashtra (1980) 82 BOMLR 173, HC (refd)
Gunapathy Muniandy v Dr James Khoo [2001] SGHC 165, HC (refd)
- I *Krishna Rao Gurumurthi & Anor v PP and another appeal* [2007] MLJU 888; [2007] 4 CLJ 643, CA (folld)
Kwang Boon Keong Peter v PP [1998] 2 SLR 592, HC (refd)
Md Zainudin bin Raujan v PP [2013] 3 MLJ 773, FC (refd)
Molu And Ors v State of Haryana AIR 1976 SC 2499, SC (folld)

- Muthusamy v PP* [1948] 1 MLJ 57 (folld) A
Ong Joo Chin v Rex [1946] 1 MLJ 1 (refd)
Prakash Chand v State (Delhi Administration) 1979 AIR 400, SC (refd)
PP v Azilah bin Hadri & Anor [2015] 1 MLJ 617, FC (refd)
PP v Hashim bin Hanafi [2002] 4 MLJ 176, HC (refd) B
R v Broughton [2010] EWCA Crim 549, CA (refd)
R v Doheny and Adams [1996] Lexis Citation 5150; [1996] EWCA Crim 728, CA (refd)
Rangi Lal And Ors v State of UP 1991 CriLJ 916, HC (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630; [2013] 4 CLJ 149, FC (folld) C

Legislation referred to

- Criminal Procedure Code s 402A
 Evidence Act [SG] ss 47, 48, 53, 62, 62(1)
 Evidence Act 1950 ss 8, 8(1), 11, 27, 35, 45, 46, 51, 73, 145(1), 155, 155(c) D
 Penal Code ss 34, 107(1), 302
Manjeet Singh Dhillon (Manjeet Singh Dhillon) for the first appellant.
Hisham Teh Poh Teik (Gurbachan Singh with him) (Bachan Kartar) for the second appellant. E
Amer Hamzah bin Arshad (Khaizan Sharizad bt Ab Razak) (Amerbon) for the third appellant.
T Vijayandran (T Vijay & Co) for the fourth appellant.
Saiful Edris bin Zainuddin (Idham bin Abdul Ghani, Hamdan bin Hamzah, Norinna Bahadun and Jasmee Hameeza bt Jaafar with him) (Public Prosecutor, Attorney General's Chambers) for the respondent. F

Arifin Zakaria Chief Justice, Richard Malanjum CJ (Sabah and Sarawak), Suriyadi, Azahar Mohamed and Zaharah Ibrahim FCJJ (delivering judgment of the court): G

INTRODUCTION

[1] These are appeals against the decision of the Court of Appeal dated 4 December 2015 which dismissed the appellants' appeals against the decision of the High Court. H

[2] In the High Court, each of the appellants was charged with four charges under s 302 of the Penal Code read together with s 34 of the same Code for the murder of Kamaruddin bin Shamsuddin ('Kamal'), Noorhisham bin Mohammad ('Hisham'), Sosilawati bt Lawiya ('Sosilawati') and Ahmad Kamil bin Abdul Karim ('Kamil'), an offence which carries the mandatory death penalty. In this judgment, unless identified separately, the deceased persons will be collectively referred to as 'Sosilawati and the three others'. The appellants I

A were convicted as charged and sentenced to death. The four charges read as follows:

1st Charge

B Bahawa kamu pada 30 Ogos 2010 di antara 8.30 malam dan 9.45 malam, bertempat di Lot No 2001, Jalan Tanjung Layang, Tanjung Sepat, Banting di dalam Daerah Kuala Langat, di dalam Negeri Selangor Darul Ehsan, bagi mencapai niat bersama kamu semua telah melakukan bunuh ke atas Kamaruddin bin Shamsuddin (No K/P 660809-06-5241) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan yang dibaca bersama dengan s 34 Kanun yang sama.

2nd Charge

D Bahawa kamu pada 30 Ogos 2010 di antara 8.30 malam dan 9.45 malam, bertempat di Lot No 2001, Jalan Tanjung Layang, Tanjung Sepat, Banting di dalam Daerah Kuala Langat, di dalam Negeri Selangor Darul Ehsan, bagi mencapai niat bersama kamu semua telah melakukan bunuh ke atas Noorhisham bin Mohammad (No K/P 720913-01-5043) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan yang dibaca bersama dengan seksyen 34 Kanun yang sama.

3rd Charge

E Bahawa kamu pada 30 Ogos 2010 di antara 8.30 malam dan 9.45 malam, bertempat di Lot No 2001, Jalan Tanjung Layang, Tanjung Sepat, Banting di dalam Daerah Kuala Langat, di dalam Negeri Selangor Darul Ehsan, bagi mencapai niat bersama kamu semua telah melakukan bunuh ke atas Sosilawati binti Lawiya (No K/P 630712-01-5240) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan yang dibaca bersama dengan seksyen 34 Kanun yang sama.

4th Charge

G Bahawa kamu pada 30 Ogos 2010 di antara 8.30 malam dan 9.45 malam, bertempat di Lot No 2001, Jalan Tanjung Layang, Tanjung Sepat, Banting di dalam Daerah Kuala Langat, di dalam Negeri Selangor Darul Ehsan, bagi mencapai niat bersama kamu semua telah melakukan bunuh ke atas Ahmad Kamil bin Abdul Karim (No K/P 781023-05-5253) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan yang dibaca bersama dengan seksyen 34 Kanun yang sama.

I [3] For convenience, in this judgment the appellants will be referred to as they were in the High Court. Pathmanabhan a/l Nalliannan will be referred to as the first accused, Thilaiyallagan a/l Thanasagaran will be referred to as the second accused, Matan a/l Ravichandran will be referred to as the third accused and Kathavarayan a/l Rajodorai will be referred to as the fourth accused. Where reference is to a single accused person, he will be referred to as 'the accused' and where reference is to more than one accused person, they will be referred to as 'the accused persons'.

PROCEEDINGS IN THE HIGH COURT

A

Brief facts

[4] In the afternoon of 30 August 2010 (the day in question), Sosilawati left for Banting, Selangor. She told her daughter, Erni Dekriwati Yuliana bt Buhari ('SP15'), that she was going to Banting to meet her lawyer, the first accused. The purpose of the visit as told by Sosilawati to SP15 was to bring forward the payment of two cheques in the sum of RM3m and RM1m respectively issued by the first accused. SP15 said that Sosilawati needed the money to pay bonuses to her staff and to give her family some money for the upcoming Hari Raya Aidilfitri.

B

C

[5] Sosilawati left her office at Nouvelles Visages, No 59, Lorong Haji Hussein 1, Off Jalan Raja Bot, Kuala Lumpur with her driver, Kamal, in her BMW car bearing registration No WTL 11. She was accompanied by a banker, Hisham, and a lawyer, Kamil. Hisham and Kamil were travelling in another car, a BMW bearing registration No AAJ 5, which belonged to Kamil.

D

[6] Suzanna bt Radin Pangat ('SP8'), Hisham's wife, and Sabrina bt Adnan ('SP14'), Kamil's wife, confirmed that on the day in question their husbands accompanied Sosilawati to Banting.

E

[7] Throughout the journey to Banting, various telephone conversations took place between Sosilawati, Kamal, Hisham and Kamil with their respective family members and friends, alluding to the fact that they were going to Banting. Kamal's nephew, Khairul Izwan bin Ismail ('SP9') spoke to Kamal at about 5pm on the day in question of his intention to sleep over at the latter's house. In the course of the conversation, Kamal told SP9 that he was in Banting with Sosilawati.

F

G

[8] Lyly Zanariah bt Abdul Manaf (SP62), a bank officer at CIMB, Kampung Baru Branch, also testified that Hisham had informed her in the morning that he would be in Banting in the evening on the day in question to break fast with a lawyer.

H

[9] Zurayina bt Jemaat ('SP7'), a salesgirl at Fazz Enterprise Banting, mentioned of her encounter with Sosilawati and a person called 'Kamal' at her shop at about 5.20pm SP7 told the court that Sosilawati bought 'kerepek' and cakes worth RM200.

I

[10] At about 7pm on the day in question, Kamil called SP15. During the telephone conversation between Kamil and SP15, Kamil had said 'entah mak

A engkau bawa pergi hutan mana ni pokok kelapa sawit ni ...'. Kamil also informed SP15 that Sosilawati was in another car in front of them.

B [11] At about 8.30pm on the day in question, SP15 received an unusual call from Sosilawati. Sosilawati informed SP15 that Kamal had taken photographs of her in compromising positions via hidden cameras placed in her bathroom in her house. Sosilawati's friend, Habishah bt Bahari ('SP16') received a similar call. That was the final call SP15 and SP16 received from Sosilawati. Upon checking Sosilawati's bathroom, SP15 found nothing untoward.

C [12] Hisham and Kamil similarly made calls to their respective wives informing them that they would not be returning home for the next three days as they would be in Genting Highlands. The reasons given were related to the problem faced by Sosilawati with her driver. After the calls, Sosilawati and the three others could no longer be contacted.

D [13] On 31 August 2010, Sosilawati's ex-husband, Buhari bin Mohamed ('SP24') and SP15 went to Banting to look for Sosilawati. There was no trace of her. SP24 then called the first accused who denied having met Sosilawati on the day in question.

E [14] Following reports lodged by the respective family members, the police mounted an investigation which focused on Lot 2001, Jalan Tanjung Layang, Tanjung Sepat, Banting, a farm ('the farm') belonging to the first accused.

F [15] Siti Hamidah Karnax ('SP33'), an Indonesian maid who worked on the farm, testified that at about 7pm on the day in question she saw one woman and three men at the farm and that she later heard a woman scream. She also saw a big fire that reached the height of the adjoining oil palm trees. She saw the first and the fourth accused having a conversation near the dog kennels. They were then seen by SP33 leaving in a hurry in the fourth accused's car. SP33 further told the court that she had seen logs being off-loaded from a lorry a day earlier by the third accused and other workers. She also saw preparations being made earlier on the fourth accused's instruction, indicating the arrival of guests at the farm.

G [16] Apart from the evidence alluded to above, the prosecution also led evidence of the telecommunication records kept by the various service providers, namely, Digi, Maxis and Celcom, which charted the journey of Sosilawati and the three others until their final destination at the farm. These records included the records of the registered users of the mobile telephone numbers as well as call detail records ('CDR') and itemised bills. The CDRs and itemised bills captured the details of incoming and outgoing calls, and short messaging system messages ('SMS') as well as the time the calls and SMS

messages were made. Amongst the witnesses called from the telecommunication companies were: from Celcom, (i) Norazlina bt Ahmed ('SP40'), (ii) Abdul Latif bin Mohamed ('SP41'), (iii) Haisal bin Hambali ('SP44') and (iv) Mohd Razali bin Ismail ('SP102'); from Maxis, (i) Ahmad Safuan bin Shahrani ('SP46') and (ii) Prasath a/l Ramasamy (SP47); and from Digi, Chong Chee Wah ('SP64').

A

B

[17] The information from the telecommunication records identifies the transmission towers servicing these calls. This indicates the locations of the persons communicating. The duration of the calls was also recorded.

C

[18] Chief Inspector Govindan a/l Narayasamy ('SP32') testified that the information given by the second and fourth accused persons together with Suresh a/l Ulagathan ('SP29'), led SP32 and his team to various spots inside and outside of the farm where numerous incriminating items were discovered.

D

[19] Defence counsel objected to the admission of evidence of the information that led to the discovery of these items as they contended that it was given under oppression. The trial judge then conducted a trial within a trial ('TWT') to determine whether there was any oppression on the second and fourth accused persons and SP29. At the TWT, nine witnesses testified on behalf of the second and fourth accused persons including the second and fourth accused persons, while the prosecution called ten rebuttal witnesses. At the end of the TWT, the trial judge ruled that there was no evidence of oppression and he accordingly admitted the information given by the second and fourth accused persons and SP29.

E

F

[20] Acting on the information given by the second and fourth accused persons and SP29, SP32 and a team of police officers were led to a black spot at the farm. On digging this black spot a number of bones were unearthed. The bones were cleansed and handed over to medical personnel for forensic examination.

G

[21] From the farm, the police also seized a cricket bat which had traces of blood. The police also took cotton swabs of blood traces found on the walls of one of the buildings.

H

[22] Acting on information given by the second and fourth accused persons and SP29, the police with the help of police divers also discovered a number of other items, which included watches and handphones, which were later identified by their respective family members as belonging to Kamil, Hisham and Kamal.

I

[23] On the information of the second and fourth accused persons and

A SP29, the police also discovered two vehicles used by Sosilawati and the three others to go to Banting. The vehicles were found at two different locations in Subang Jaya.

B [24] Finally on the information given by the second and fourth accused persons and SP29, the police found burnt logs in a rubbish dump not far from the farm. The police also found burnt zinc sheets some of which bore traces of blood. All these items were seized and handed over to various agencies for forensic examinations.

C *Medical evidence*

D [25] A number of medical doctors were called by the prosecution. The three doctors who examined the bones discovered from the river and the farm were Nurliza bt Abdullah ('SP63'), Zaleha bt Abdul Manaf ('SP71') and Faridah bt Mohd Nor ('SP80'). SP71 and SP80 could not make positive findings on the bones as they were too charred and burnt indicating exposure to extreme heat. For the same reason no DNA extraction or analysis could be done by the chemist, Lim Kong Boon ('SP86'). SP63 however gave evidence that some of the bones discovered from the farm and river were human bones.

DNA evidence

F [26] SP86 testified that he had analysed the blood samples from the cricket bat and the wall of a building in the farm. SP86 found that the cricket bat had the DNA of Hisham and that the DNA on swab 9 from the wall also matched that of the immediate family members of Hisham. The zinc sheets were also analysed, and the results revealed that three of the zinc sheets, exhs P80A, P78A and P75A, had the DNA of Kamal and Kamil.

G *Evidence of SP29 and SP59*

H [27] The prosecution called SP29 and SP59 who were arrested together with the second and the fourth accused persons. Both SP29 and SP59 were earlier charged in the Magistrates' Court at Teluk Datuk on 15 October 2010 for disposing of evidence related to the murder trial. SP29 was charged with disposing of the ashes of Sosilawati and the three others while SP59 was charged with helping to burn their bodies.

I [28] Both SP29 and SP59 pleaded guilty to the charges and had admitted to the facts tendered by the prosecution which contained statements that Sosilawati and the three others were burnt to death at the farm and their ashes disposed of.

[29] However, before the learned trial judge, SP29 and SP59 withdrew their earlier statements and stated that nothing untoward happened at the farm on the day in question. They went on to allege that they were coerced into pleading guilty and admitting to the facts of the case in the magistrates' court on 15 October 2010.

A

[30] Following that, the prosecution then sought to impeach the credibility of SP29 and SP59. Two separate TWTs were conducted by the learned trial judge. At the end of the TWTs, the learned trial judge ruled that SP29's credibility was impeached and SP59 was declared a hostile witness, rendering the evidence of both SP29 and SP59 worthless.

B

C

[31] The prosecution, amid strong objections from the defence, then applied to adduce the records of proceedings in the magistrates' court under ss 11 and 73 of the Evidence Act 1950 ('the EA'). After hearing arguments, the learned trial judge invoked ss 11 and 35 of the EA and allowed the application by the prosecution. The record of proceedings containing the guilty pleas of SP29 and SP59 were then admitted and marked as exhs P711 and P712 respectively.

D

FINDING OF THE HIGH COURT AT THE CLOSE OF THE PROSECUTION CASE

E

[32] At the end of the prosecution case, upon a maximum evaluation, the learned trial judge held that the prosecution had succeeded in proving a prima facie case against all the accused persons on the four charges. Accordingly, they were called upon to enter on their defence.

F

THE DEFENCE CASE

[33] All the accused persons elected to give their evidence on oath.

G

The first accused

[34] In his defence, the first accused stated that in the evening of the day in question, he visited his mother at her house and he also went with an estate agent to view some land. At about 8.30pm, the fourth accused drove him to Subang Jaya to meet a friend.

H

[35] He admitted that the farm belonged to him. However, he stated that he did not go to the farm on the day in question let alone meet Sosilawati and the three others there.

I

[36] The first accused, however, confirmed that he was the lawyer for Sosilawati in a land transaction in Penang. Apart from that, he had an interest

A in the purchase of the land. He admitted he was also the lawyer for another company belonging to one Rahman Palil for the same piece of land and also had an interest in that land transaction.

B *The second and third accused persons*

C [37] The second and the third accused persons stated that they worked at the farm and admitted being present at the farm on the day in question. They stated that although the first accused was the owner of the farm, their dealings were mostly with the fourth accused, who paid their salaries, and who directed and supervised their work at the farm.

D [38] The second and the third accused persons testified that the first accused did not come to the farm on the day in question and that nothing untoward happened at the farm on that day. They further testified that both of them together with the fourth accused, SP29 and SP59 gathered at the farm around midnight on the day in question to hoist the Malaysian flag and to light a small fire to celebrate Merdeka Day. Thereafter, they ate and slept until the next morning.

E [39] The second accused stated that in the morning of 31 August 2010, he went to his grandmother's house and returned only in the evening. The defence called the second accused's grandmother Angamah a/p Rengasamy (SD13) and she confirmed that the second accused did visit her in the morning of
F 31 August 2010 and stayed till evening.

[40] The third accused merely stated that on 31 August 2010, he carried out his routine work at the farm.

G *The fourth accused*

H [41] The fourth accused testified that he stayed at the farm which belonged to the first accused. He stated that his role was limited to the construction works at the farm and the supervision of workers involved in the construction works. He stated that the rest of the farmhands including the second and the third accused persons were under the direct supervision of the first accused. He further testified that the second accused was also the bodyguard of the first accused.

I [42] Contrary to the evidence of the first, second and third accused persons, the fourth accused stated that the first accused was at the farm on the day in question and that Sosilawati and the three others came to the farm on that day

to meet the first accused. The fourth accused testified that there were about four or five other persons besides Sosilawati who came to the farm at the same time on the day in question.

A

[43] The fourth accused further stated that he heard a quarrel in one of the buildings at the farm, and when he went in he saw Sosilawati's driver being beaten. He also testified that he saw the lawyer (Kamil) being beaten and that he heard the first accused giving instructions to the second and third accused persons to kill the driver and the lawyer.

B

[44] The fourth accused also stated that he saw Sosilawati and the three others being bundled off to the neighbouring farm and the next morning he saw them being brought back to the farm. At the farm, he witnessed the three persons who accompanied Sosilawati being burnt with the logs at the location, which he marked on a sketch plan.

C

D

[45] The fourth accused testified that the first accused had cajoled him to accept what had happened and asked him and the second and third accused persons to remain silent on the matter. The first accused had also prepared them to face possible arrest and indicated that they could cooperate with the police as later on they could retract any statement to the police by claiming that the statement was given under force or duress.

E

Remaining defence witnesses

F

[46] Kandasamu a/l Nadeson ('SD15'), the father of SP59, testified that on the arrest of SP59 he had engaged the services of Avtaar Singh a/l Sukhdev Singh ('SD9') to defend SP59 in the event he was charged.

G

[47] SD15 stated that he was however summoned to the Kuala Lumpur police contingent headquarters where he was persuaded by the police to appoint a lawyer recommended by them if he wanted to see his son freed. He was pressured into signing the warrant to act authorising the lawyer as recommended by the police to represent SP59.

H

[48] SD15 further stated that he was later informed that a team of lawyers had been assigned to defend his son during the proceedings in the Magistrates' Court at Teluk Datuk. At this point, SD15 said that he had a change of heart and wanted to revert to SD9. SD15 spoke to SP59 to convince him to revert back to the earlier lawyer but SP59 refused.

I

[49] The evidence of SD9 echoed that of SD15, where SD9 testified as to how he was unceremoniously dumped in favour of another team of lawyers,

A and that he only discovered this when he attended the Magistrates' Court at Teluk Datuk in the morning of the proceedings.

B [50] ACP Abdul Aziz bin Zakaria (SD28) admitted that he had recommended his acquaintance, Roslie bin Sulle ('SD30'), to defend SP29 and SP59 when SD30 came to his office on an unrelated matter.

C [51] SD30 confirmed that he acted for SP29 and SP59 with another lawyer by the name of Puravaleen and that he did so with the explicit and written agreement of both SP29 and SP59 and their families.

D [52] A number of police officers were called by the defence to show that the oral testimony of SP32 and his team in relation to the information leading to discovery was contrary to the entries in the lock up register, and that the movements in and out of the lock up showed that the accused persons were kept away for long periods of time.

E [53] Pavithra a/p Rama Sundran ('SD26'), an occupant of the farm, confirmed that SP33 was also an occupant of the farm, working as a maid. SD26 testified that nothing unusual happened at the farm on the night of the day in question. She said she neither heard nor saw any fire outside the house where they stayed. She further testified that there was no unusual activity on 31 August 2010 at the farm.

F [54] Sivabalan a/l Nagayah (SD20) was a government chemist entrusted with the task of analysing soil samples from the tyres of the vehicles handed to him by the police. He confirmed that he was not requested or directed to carry out comparison studies of the soil samples taken from the tyres of the car with the soil samples taken from the farm.

G [55] Balasubramaniam a/l P Chinaswary ('SD12'), a person who carried out Hindu cremations, testified as to how a cremation was done and its aftermath. It was the evidence of SD12 that the logs discovered by the police were not suitable for open burning cremation and that it would be impossible for more than one body stacked on top of one another to be burnt effectively.

H
FINDING OF THE HIGH COURT AT THE CLOSE OF THE DEFENCE
CASE

I [56] At the close of the defence case, the learned trial judge found that all the accused persons failed to cast a reasonable doubt on the prosecution case. The circumstantial evidence led by the prosecution was sufficient to prove its case beyond reasonable doubt. All the accused persons were found guilty of the offences as charged and sentenced to death.

PROCEEDINGS IN THE COURT OF APPEAL

A

[57] Aggrieved, all the accused persons appealed to the Court of Appeal. They failed in their appeals. Their convictions and sentences were affirmed by the Court of Appeal.

B

PROCEEDINGS IN THIS COURT

[58] Before us, several issues were raised by learned counsel for the accused persons contending that both the High Court and the Court of Appeal had erred in their findings. We will deal with these issues first before considering whether or not the convictions of the accused persons are safe.

C

ALIBI DEFENCE

[59] This issue is in respect of the first accused alone. It was raised at the prosecution stage. The mandatory notice pursuant to s 402A of the Criminal Procedure Code ('the CPC') was served.

D

[60] The time stipulated in the charges against the first accused was between 8.30pm–9.45pm on the day in question.

E

[61] It was the defence of the first accused that he was nowhere near the scene of the crime at the time as stated in the charges. As such it was impossible for him to have been involved in the murder at the farm. At the material time, he was on his way to meet a retired police officer, Mohamad Jamil bin Mohamad Hasan ('SP61'), at Dorsett Hotel, Subang Jaya.

F

[62] In his evidence, SP61 testified that the first accused called him around 1.30pm on the day in question, to invite him for breaking of fast since it was then the fasting month. But according to SP61 the first accused failed to turn up at the appointed time. Consequently SP61 called the first accused who told him that he would not be able to make it for the breaking of fast. However the first accused asked SP61 to wait for him because he 'got some uncompleted work to do'. No time was given to SP61 of when he would be arriving. The first accused only called back SP61 after 10pm that same evening. When SP61 arrived at the hotel, the first accused was already waiting for him. SP61 did not see who drove the first accused to the hotel. The first accused told SP61 that it was the first accused's brother who drove him there, but the brother had left him to meet some friends. According to SP61 their meeting lasted for about two hours.

G

H

I

[63] The first accused maintained that he was already in Banting town at 5pm on the day in question and he went to his mother's house around 5.30pm.

A The first accused then met a friend by the name of Manickam to discuss some business matters. He later asked Ravi (the fourth accused) to pick him up around 8.20pm and drive him to Subang Jaya to meet up with SP61. He further testified that it took 1 1/2 hours to travel from the farm to Dorsett Hotel, Subang Jaya.

B

[64] Our courts in several cases have discussed the principles related to the defence of alibi (see *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617 and *Duis Akim & Ors v Public Prosecutor* [2014] 1 MLJ 49.)

C

[65] In *Duis Akim & Ors* this court said this:

[92] (i) 'the defence of alibi must preclude the possibility that the accused could have been physically present at the place of the crime or its vicinity at or about the time of its commission' (see: *Regina v Youssef* (1990) 50 A Crim R1 at pp 2-3);

D

(ii) the correct 'approach to be adopted in regard to an alibi defence, ... is to consider the alibi in the light of the totality of the evidence and the court's impression of the witnesses. If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable. The ultimate test, and there is only one test in a criminal case, is whether the evidence establishes the guilt of the accused beyond reasonable doubt' (see: *S v Leve (CA&R 163/12)* [2013] ZAECGHC 5 (31 January 2013) (South Africa));

E

(iii) as such 'it would be wrong to reason that if the evidence of the state witnesses, considered in isolation, is credible the alibi must therefore be rejected. The correct approach is to consider the alibi in the light of all the evidence in the case and the court's impressions of the witnesses and from that totality to decide whether the alibi might reasonably be true' (see: *R v Hlongwane* 1959 (3) SA 337);

F

(iv) '(O)nce the trial court accepted that the alibi evidence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence linking the appellant to the offences. The acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, when considered in its totality, of the nature that proved the alibi evidence to be false' (see: *S v Liebenberg* 2005(2) SACR 355 (SCA));

G

(v) '(I)t is trite that once an accused person pleads an alibi he does not assume the burden to prove it is true. The onus is on the prosecution to prove by evidence the alibi is false and to place the accused squarely at the scene of crime' (see: *Mutachi Stephen v Uganda*). The evidence of his alibi need only raise a reasonable doubt that he committed the crime (see: *R v Lizotte* 1950 CanLII 48 (SCC); [1951] SCR 115); and

H

(vi) the alibi of an accused does not have to be corroborated by independent evidence in order to raise a defence (see: *R v Letourneau* [1994] BCJ No 265 (QL) (CA), 61).

I

[66] In the present case the learned trial judge dealt with the defence of alibi of the first accused in these words:

It is glaringly obvious that the defence of the accused was not untied especially between the first three accused and the fourth accused ...

A

In this case the first accused testified that at about 8.30pm on 30 August 2010 he was taken by the fourth accused to see a friend at Subang Jaya. This was flatly denied by the fourth accused who testified that he never left the farm the night of 30 August 2010 and therefore adverting the first accused was lying on this matter. The first accused together with the second and third accused contended that the fourth accused was not on the farm the night of 30 August 2010 and he did not meet Sosilawati and company on the farm that night or any time after.

B

The fourth accused again traversed this claim by admitting that Sosilawati did come to the farm on 30 August 2010 and did meet the first accused. Both the second and third accused were present.

C

The first accused together with second and third accused also testified that nothing untoward or unusual happened on the farm on the 30 August 2010 or 31 August 2010. This evidence was again repelled by the fourth accused ...

D

In the face of such diversity between the evidence of the accused the court could choose to disbelieve the evidence of all the accused and accept the version of the prosecution. The defence sought to explain this diversity in evidence to the fact there was a fall out between the first accused and the fourth accused when the 1st accused rejected a request of help from the fourth accused. This could be true but it still does not explain the diversity in evidence bearing in mind especially that some portion of the evidence of the fourth accused is consistent with the prosecution's evidence.

E

[67] The Court of Appeal agreed with the findings. It opined that the defence of alibi should be rejected for the following reasons:

F

[178] To establish alibi, the 1st appellant must disclose where he was at the time of the alleged offence and what he was doing (see *Vasan Singh v Public Prosecutor* [1988] 3 MLJ 412; [1989] 1 CLJ Rep 166). The time preferred in the charge was between 8.30pm–9.45pm on 30 August 2010. The first appellant arrived at Dorsett Hotel, Subang to meet SP61 at about 10.15pm–10.20pm. We find that the evidence of SP61 is not evidence in support of alibi. The first appellant could be travelling at the time stated in the charge in which case the evidence of his brother who had purportedly driven him to Subang would be material but the brother was not called to testify.

G

[179] Further, the evidence of the first appellant in his defence contradicts the evidence given by SP61. According to SP61, the first appellant told him that the first was sent to Dorsett Hotel by his brother. In his defence, the first appellant stated that it was the fourth appellant who had driven him to Dorsett Hotel, which version was denied by the fourth appellant. In the circumstances we find that the first appellant's defence of alibi had failed to raise a reasonable doubt on the prosecution case.

H

I

[68] A defence of alibi is factual, premised on evidence adduced. In the present case the courts below had made their factual findings related to the

- A defence of alibi. We have examined the basis of those findings and we have no reason to disagree with them. It may be noted that the first accused missed his appointment with SP61 to break fast which was supposed to be in the early part of the evening on the day in question. He only arrived at the hotel past 10pm that evening. There was in fact no evidence adduced as to where the first accused was prior to his arrival at the hotel. Even the evidence on how he came to the hotel was subject to two conflicting versions. SP61 said that the first accused told him that it was his brother who dropped him at the hotel while the first accused claimed that it was the fourth accused who drove him to the hotel, which the fourth accused denied. SP33 testified that around 1am when she went to pick up the pail from the karaoke hut, she saw the fourth accused with three of his workers. Confronted with such evidence, it was not surprising that the courts below did not accept the defence of alibi of the first accused. As will be elaborated later in this judgment, the evidence related to the telephone calls and the SMS messages show that the first accused could still be in Banting just before 9pm on the day in question.

[69] Accordingly we find no merit in the alibi defence of the first accused.

CREDIBILITY OF SP32

Denial of the right to impeach SP32

- F [70] One of the grounds raised by the accused persons concerned the dismissal by the High Court of their application to impeach the credit of SP32, who was undoubtedly a key prosecution witness. As alluded to earlier, the prosecution had led through SP32's evidence pertaining to discovery information under s 27 and evidence of conduct under s 8 of the EA. Evidence relating to information leading to discovery, and evidence of conduct, constitute the main plank of the prosecution case against the accused persons, in particular the second, third and fourth accused persons. Issues arose in the trial on the credibility of SP32 over the material contradictions of his evidence in court and a series of former written statements in the form of police reports lodged by SP32 himself.
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- H [71] In the course of the trial in the High Court, learned counsel for the first accused applied to impeach SP32 based on the alleged contradictions between his evidence in court and his own police reports, in particular Banting Report 7044/10 ('Banting report') lodged on 12 September 2010 and Tanjong Sepat Report 0947/10 ('Tanjong Sepat report') lodged on 13 September 2010. This impeachment application was dismissed by the learned trial judge for the following reasons:
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- (a) the police reports not being first information reports were inadmissible and could not be used to impeach a witness; and

- (b) there were no material discrepancies between the police reports and the evidence of SP32 in court. A

[72] The Court of Appeal disagreed with the learned trial judge. The Court of Appeal held that the learned trial judge erred in ruling that the police reports lodged by SP32 were inadmissible. More significantly, upon examining the appeal record, the Court of Appeal found that there were material discrepancies between the evidence of SP32 in court and his police reports. In its judgment, the Court of Appeal held that the finding of the learned trial judge that there were no material discrepancies was for that reason perverse. In spite of this finding, the Court of Appeal placed reliance on the evidence of SP32 pertaining to the conduct of the second, third and fourth accused persons under s 8 of the EA, which formed one of the foundations of the case for the prosecution against them. The Court of Appeal said this: B
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[122] We nevertheless agree with the learned trial judge that the acts of the second to the fourth appellants in taking SP32 and pointing to the places where the items were recovered amount to conduct which is admissible under s 8 of the EA. D

...

[123] ... We therefore accept the evidence of SP32 insofar as it relates to the fact that the second to the fourth appellants had displayed conduct consistent with their knowledge of the places where the items which were connected to the commission of the offence and which belonged to the victims were disposed off. E

[73] Before us, learned counsel for the first accused submitted that having found that there were material discrepancies, the Court of Appeal should have gone on to hold that the denial to the first accused of the right to impeach SP32 was a denial of a fundamental right to due process of law. Given that there were material discrepancies, it was further submitted that the Court of Appeal erred in accepting the evidence of SP32 in relation to the evidence of conduct under s 8 of the EA. Learned counsel submitted that had the learned trial judge correctly accorded the first accused this right and thereafter rule that there were material discrepancies (as the Court of Appeal had found), the impeachment procedure would have been started and the first accused would then have an extensive right of cross-examination. He further argued that the impeachment procedure would have mandated the learned trial judge to ask SP32 for an explanation for all of the material discrepancies and, in the absence of any credible explanation, SP32 would have been impeached. According to learned counsel, SP32's credibility would have been demolished and without him, to borrow his words, 'the prosecution would not even have had the semblance of a case'. F
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[74] In similar vein, learned counsel for the second accused submitted that the learned trial judge had seriously erred in law and in fact in dismissing the

- A application to impeach SP32 with his own police reports. He submitted that the ruling had severely prejudiced the second accused. Hence, the s 27 discovery information would be rejected on the basis that SP32 had failed to pass the twin tests of ‘reliability and accuracy’ as enunciated by this court in *Krishna Rao Gurumurthi & Anor v Public Prosecutor and another appeal* [2007] MLJU 888; [2007] 4 CLJ 643.
- B

- [75] As observed by this court in *Dato’ Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293; [2015] 2 CLJ 145, impeachment is generally to call into question the veracity of a witness by means of evidence adduced for such purpose or the adducing of proof that a witness is unworthy of belief. The purpose of the impeachment of the credit of a witness is to undermine his credibility by showing that his testimony in court should not be believed because he is of such a character and moral make-up that he is one who is incapable of speaking the whole truth under oath and should not be relied on (per Yong Pung How CJ in *Kwang Boon Keong Peter v Public Prosecutor* [1998] 2 SLR 592).
- C
- D

- [76] Two provisions of the EA are relevant, and they provide a good starting point in considering the submissions advanced by the accused persons. The first is s 155, which prescribes the three methods by which the credit of a witness may be impeached, namely:
- E

- (a) by the evidence of persons who testify that they from their knowledge of the witness believe him to be unworthy of credit;
- F
- (b) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence; and
- (c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.
- G

- [77] The second provision is s 145(1) which provides that a witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined, without the writing being shown to him or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.
- H

- [78] In the present case, a point to note is that the accused persons relied on s 155(c) to impeach the credit of SP32 by proving that SP32’s former statements, that is to say, the police reports, are inconsistent with certain parts of his evidence in court that are liable to be contradicted.
- I

[79] As such, the central question which we must first ask is, whether the former statement as envisaged in s 155(c) may be in the form of a police report of SP32, notwithstanding that such report is not a first information report. On this, as stated earlier, the learned trial judge did not allow the application to contradict SP32 based on his police reports on the ground that they were not first information reports. The Court of Appeal, however, took a contrary view.

[80] The phrase 'first information report' is commonly used in relation to information given under s 107(1) of the CPC relating to the commission of an offence for which a person is charged. The first information report is usually made very early after the occurrence of an offence and forms the basis of the case (see *Mallal's Criminal Procedure* (6th Ed), para 4152). A first information report serves as a complaint to the police to set the criminal law in motion, whereas the other reports, such as an arrest report, relate to steps taken by the police subsequently (see *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85). What should be noted here is that the police reports made by SP32 were not first information reports made under s 107(1) of the CPC but were in point of fact made by SP32 relating to discovery information in the course of police investigation. These reports were made after police investigation had already commenced. In our judgment, for the purpose of s 155(c) of the EA, it makes no difference whether the police reports are first information reports made under s 107(1) of the CPC or otherwise. The issue must be approached on the basis of the language used in s 155(c). The term 'statement', which is very broadly drafted is not defined anywhere in the EA. In our judgment, the term 'statement' used in s 155(c) is comprehensive enough to include first information reports made under s 107(1) of the CPC and also police reports made after police investigation has already commenced. It would be unduly restrictive to confine the term exclusively to first information reports. We draw support for this view from the judgment in *Balachandran v Public Prosecutor* where this court, in discussing the distinction between first information reports and other police reports, said at pp 311–312 (MLJ); pp 95–96 (CLJ):

The distinction between both types of reports is not anchored on rules relating to their admissibility but the purpose they serve. While a first information report serves as a complaint to the police to set the criminal law in motion the other reports relate to steps taken by the police thereafter as, for example, an arrest report. Thus any change in the law relating to their admissibility cannot alter their character. The distinction between both types of reports still remains. It must be added that only the first information report is admissible under s 108A in addition to ss 145 and 157 of the Evidence Act 1950 while the other reports are admissible only under the latter provisions of law.

A [81] In light of the foregoing discussion, we therefore prefer the view of the Court of Appeal that the police reports being the former statements made by SP32 could be used to impeach his credit under s 155(c) read together with s 145(1) of the EA.

B [82] The proper method of impeaching the credit of a witness had been well set out in *Muthusamy v Public Prosecutor* [1948] 1 MLJ 57, which was approved by this court in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* and *Krishna Rao Gurumurthi & Anor v Public Prosecutor and another appeal*. As the key to the determination of the issue centred on the proper method of impeaching the credit of SP32, it is apposite to set out in extenso the judgment of Taylor J in *Muthusamy v Public Prosecutor* as follows:

D The proper way to apply the sections is this. On the request of either side, the court reads the former statement. If there is no serious discrepancy the court so rules and no time is wasted. The first necessity is to read it with the confident expectation that it will be different from the evidence but looking judicially to see whether the difference really is so serious as to suggest that the witness is unreliable. Differences may be divided into four classes:

- (a) Minor differences, not amounting to discrepancies;
- E (b) Apparent discrepancies;
- (c) Serious discrepancies;
- (d) Material contradictions.

F Minor differences are attributable mainly to differences in interpretation and the way in which the statement was taken and sometimes to differences in recollection. A perfectly truthful witness may mention a detail on one occasion and not remember it on another. A mere omission is hardly ever a discrepancy. The police statement is usually much briefer than the evidence. Both the statement and the evidence are usually narratives reduced from question and answer. The witness is not responsible for the actual expressions used in either, and all the less so where he does not speak English. If the police statement gives an outline of substantially the same story there being no apparently irreconcilable conflict between the two on any point material to the issue, the magistrate should say at once:

H The difference is not such as to affect his credit' and hand the statement back.

I If, however, the difference is so material as probably to amount to a discrepancy affecting the credit of the witness, the court may permit the witness to be asked whether he made the alleged statement. If he denies having made it, then either the matter must be dropped or the document must be formally proved, by calling the writer or, if he is not available, by proving in some other way that the witness did make the statement.

If the witness admits making the former statement, or is proved to have made it, then the two conflicting versions must be carefully explained to him, preferably by the court, and he must have a fair and full opportunity to explain the difference. If he can, then his credit is saved, though there may still be doubt as to the accuracy of

his memory. This procedure is cumbersome and slow and therefore should not be used unless the apparent discrepancy is material to the issue.

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[83] One of the important propositions that may be distilled from the above passage is that there must be some material discrepancies before a witness can be subjected to impeachment proceedings.

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[84] With this in mind, we must now turn to address the crucial issue whether there exist serious or material discrepancies between the police reports and the evidence of SP32 in court before he could be subjected to impeachment proceedings. As discussed earlier on, the courts below came to different findings.

C

[85] In this regard, learned counsel for the second accused in his oral and written submissions took us through the evidence of SP32 led at the trial. First, he brought to our attention the relevant parts of the evidence of SP32 as can be seen at pp 7025–7026 of AR Vol 2aj when SP32 was being cross-examined by learned counsel for the first accused ('the first complaint'). The subject matter of the cross-examination was the 'temubual' on 13 September 2010 where SP32 said that he had 'temubual' the fourth accused first, followed by the second accused and then SP29. Learned counsel then brought our attention to p 7027 of the AR Vol 2aj where SP32 categorically said that both the fourth accused and SP29 never gave any information simultaneously. According to learned counsel this is in sharp conflict with the first paragraph of Tanjong Sepat report, which is reproduced as follows:

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... telah menemubual dua orang OYDS nama Kathavarayan A/L Rajodorai KP: 800103-10-5573 dan Suresh A/L Ulaganathan KP: 840624-08-5033. Saya telah menanya kepada kedua-dua OYDS di dalam Bahasa Tamil di mana mereka buang jam kepunyaan mangsa-mangsa. Kedua-dua OYDS jawab dalam Bahasa Tamil — Kami buang tiga jam tangan milik mangsa di Sungai dekat Kampong Endah dan kami boleh tunjuk sama tuan.

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[86] Learned counsel submitted that the statement in the Tanjong Sepat report could not be reconciled with SP32's evidence in court in that in the Tanjong Sepat report SP32 stated that both the fourth accused and SP29 gave the information simultaneously to SP32.

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[87] Next, learned counsel took us to p 7031 of AR Vol 2aj where SP32 was cross-examined by learned counsel for the first accused with regard to the 'temubual' at Sungai Pancau on 12 September 2010 ('the second complaint'). It was SP32's evidence in court that the three suspects were with him and his team. He named the three suspects as the fourth accused, SP29 and the second accused. It was his evidence in court that only the fourth accused provided the information as can be seen at p 7032 of the AR Vol 2aj. The relevant parts of the

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A cross-examination are re-produced:

MSD: Selain dari Mr Karthavarayan, siapa lagi you soal?

SP32: Karthavarayan sahaja Yang Arif.

B MSD: Seorang sahaja?

SP32: Ya Yang Arif.

MSD: Jadi you dapat jawapan dari satu orang sahaja, 3.45 petang di sana?

SP32: Ya Yang Arif.

C

[88] Learned counsel then argued that the aforesaid evidence of SP32 completely and materially contradicted his own Banting report where SP32 clearly stated:

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... jam lebih kurang 1545 HRS, dengan dipandu arah oleh OYDS Katharayanan A/L Rajadorai KP: 800103-10-5573 dan Thailaiyagan A/L Thanasagaran KP: 910412-14-6261 telah membawa saya bersama pasukan polis yang terdiri daripada ... ke Sungai Panchau, Jalan Morib. Sampai di situ saya bertanya kepada kedua-dua OYDS dalam bahasa Tamil yang bermaksud — Di mana tempat kamu telah buang abu mayat dan dia beritahu saya — Disinilah tempat — sambil menunjukkan jarinya ke arah dalam Sungai Panchau berhampiran paip air besar, Air Selangor, Kuala Langat ...

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[89] Learned counsel argued that there were two material discrepancies in respect of the second complaint. First, in his evidence in court, SP32 said that there were three suspects, namely, the fourth accused, the second accused and SP29, whilst in the Banting police report there were only the fourth and second accused persons. And secondly, in his evidence in court, he said that only the fourth accused provided the information whilst in the Banting police report he stated that both the fourth and second accused persons provided the information at the same time. Hence, learned counsel added that these were contradictions that came within the striking range in *Muthusamy v Public Prosecutor* where these contradictions were unmistakably classified as 'material discrepancies', warranting an explanation from SP32.

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[90] As stated earlier, the learned trial judge found that there were no material discrepancies between the police reports and the evidence of SP32 in court. The learned trial judge's brief grounds for his ruling can be seen at p 7036 of AR Vol 2aj as follows:

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... ruling kedua tentang permohonan peguambela untuk impeach the credit saksi 32 berdasarkan pada apa yang tertera dalam laporan polis. Saya telah meneliti keterangan saksi ini dalam mahkamah dan juga saya telah meneliti tiga laporan polis yang dikemukakan dan adalah keputusan ringkas saya bahawa saya tak nampak apa-apa material contradiction di antara keterangan saksi ini dengan laporan polis

ini. Jadi saya tidak membenarkan permohonan peguambela untuk teruskan dengan impeachment proceeding berdasarkan percanggahan yang dikatakan berlaku di antara keterangannya dengan laporan polis ini.

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[91] The Court of Appeal disagreed with the ruling of the learned trial judge as can be seen from the following passages of its judgment:

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[103] Learned counsel had highlighted a number of contradictions but for purposes of this judgment, suffice if we state the following.

[104] In cross-examination by learned counsel for the first appellant, SP32 stated that with regard to the 3.45pm 'temubual' at Sungai Panchau on 12 September 2010, the fourth appellant, Suresh and the second appellant were with him but only the fourth appellant provided the information. This was in conflict with his Banting Report 007044/10 where SP32 had stated that only the fourth and the second appellants were with him and that both the fourth and the second appellants provided the information at the same time.

C

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[105] We find that the above discloses a material contradiction between the evidence of SP32 and his police report and that the finding of the learned trial judge that there is no material contradiction is, with respect, perverse.

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[92] In the circumstance, the critical question for us to determine is which of the courts below came to the right decision. To answer this, we have to scrutinise the evidence carefully.

[93] From the appeal record, it is clear that before the learned trial judge made the ruling as regards the impeachment application, learned counsel had highlighted relevant parts of the police reports which were considered inconsistent, before they were handed to the learned trial judge for consideration. This approach is consistent with the procedure laid down in impeaching the credit of a witness as set out in the case of *Muthusamy v Public Prosecutor* and the case of *Ong Joo Chin v Rex* [1946] 1 MLJ 1.

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[94] We now turn to consider the first complaint. In the trial, SP32 stated that both the fourth accused and SP29 never gave any information simultaneously. In our judgment, the general tenor of his statement in the Tanjong Sepat report that '... Saya telah menanya kepada kedua-dua OYDS di dalam Bahasa Tamil di mana mereka buang jam kepunyaan mangsa-mangsa. Kedua-dua OYDS jawab dalam Bahasa Tamil ...' by and large accorded with his evidence in court. We had closely scrutinised the Tanjong Sepat report. A careful reading of the said Tanjong Sepat report disclosed that both the fourth accused and SP29 had given information to SP32 but it is particularly noteworthy that it did not explicitly state that the information was given simultaneously to SP32 by both of them, as submitted by learned counsel. A point to be borne in mind is that a police report is usually much shorter

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- A (omitting the details of the events which had occurred) than evidence in court. Minor differences in matters of detail are bound to appear between the concise SP32's police report and his elaborate evidence in court. Such minor differences cannot be elevated to the rank of major discrepancies. That explains why we do not see any material discrepancies between the Tanjong Sepat report
- B and the evidence of SP32 in court.

- [95] Turning now to the second complaint, learned counsel submitted that in the first place there was a material discrepancy on the basis that in his evidence in court SP32 stated three suspects were with him, namely, the fourth accused, the second accused and SP29, whilst in the Banting report there were only the fourth and second accused persons. We do not find learned counsel's argument persuasive. In our view, in the context of the present circumstances, a mere omission to mention SP29 in the police report is hardly ever a
- C discrepancy. The omission did not go to the crux of the matter. What is more, SP29 was not one of the accused persons in this case. Secondly, learned counsel submitted that there was a material contradiction in that in his evidence in court SP32 stated only the fourth accused provided the information and this was in conflict with the Banting report where he stated that both the fourth and
- D the second accused persons provided the information at the same time. We disagree with this submission. It is plain for us to see from reading the Banting report that SP32 did not explicitly state that both the fourth and second accused persons provided the information to him at the same time. Contrary to the submission of learned counsel, SP32 stated that '... Di mana tempat kamu telah buang abu mayat dan dia beritahu saya — Di sinilah tempat — sambil menunjukkan jarinya ke arah ...'. The first thing to notice is that SP32 used the words 'dia' dan 'jarinya' (words in the singular) in the police report. This in itself indicates clearly that only one of the suspects provided the information, which is consistent with his evidence in court that only one suspect provided
- E the relevant information to him at the relevant location and time.
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- G

- [96] Based on all the above reasons, we conclude that the Court of Appeal was in serious error in holding that there were material discrepancies between the police reports and the evidence of SP32 in court. On the facts of the case we
- H find that there were no material discrepancies in the evidence of SP32. Accordingly, there was no basis to impeach the credibility of SP32.

Denial of the right to contradict SP32 with his own police reports

- I [97] As can be seen at pp 7064–7065 of AR Vol 2aj, learned counsel for the second accused also applied to the learned trial judge to use the police reports of SP32 to contradict his evidence in court under s 145(1) of the EA, which provides that a witness may be cross-examined as to the previous statement made by him.

[98] The learned trial judge did not allow the application. The Court of Appeal took a contrary view but nevertheless held that there was no failure of justice as learned counsel for the accused persons had the opportunity to cross-examine SP32. The Court of Appeal observed as follows:

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[101] As a matter of fact, s 145 of the EA was relied upon by learned counsel for the appellants in making the application to impeach and to contradict SP32. On the authority of *Balachandran*, we find that the learned trial judge had committed an appealable error in his ruling that the police reports lodged by SP32 were inadmissible.

B

[102] Be that as it may, we are of the view that the appellants had not been deprived of their rights to a fair trial as the appellants had every opportunity to cross-examine SP32.

C

[99] Before us, it was also submitted by learned counsel for the second accused that the learned trial judge erred in disallowing the application to contradict SP32 based on his police reports. Learned counsel argued that there was procedural and substantive unfairness in that the accused persons were deprived of the legal right to contradict SP32. Further, learned counsel submitted that the Court of Appeal erred in holding that there was no failure of justice. The Court of Appeal, according to learned counsel, failed to appreciate that the right to contradict SP32 is an essential and a key component of his cross-examination.

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[100] Having examined the appeal record, we agree with the Court of Appeal that that there was no failure of justice as the accused persons had the opportunity to cross-examine SP32 as provided for under s 145(1) of the EA. It is important to note that the second application was made after the learned trial judge had dismissed the application to impeach SP32. As can be seen at pp 7024–7034 of AR Vol 2aj, the gist of learned counsel's cross-examination of SP32 revolved around the police reports made by SP32. He was subjected to a very thorough and searching cross-examination regarding the police reports.

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[101] On the issue of the credibility of SP32, we thus conclude that the challenge mounted by the accused persons against the credibility of SP32 is without merit. In our judgment the credibility of SP32 was decided wholly on the facts and the prevailing circumstances of the case, based on the inherent probabilities of his testimony. As a trier of fact, the learned trial judge had the audio-visual advantage reserved to a trial court. We have no reason to disagree with the finding of the learned trial judge that SP32 is a credible witness. In view of that, we rule that the evidence of SP32 pertaining to discovery information under s 27 and evidence of conduct under s 8 of the EA are credible and reliable.

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[102] We will now deal with s 27 evidence first and then s 8.

A SECTION 27 OF THE EA ISSUE

[103] Evidence was adduced to show that the second and the fourth accused persons had led the police team to the discovery of certain items ('the items') at various places near the farm. SP32 testified that the two accused persons supplied seven pieces of information, and they are as follows:

B

(a) the first piece of information is that on 12 September 2010 at about 10am, SP29, the third accused and the fourth accused brought SP32 and his men to the farm, which led to the discovery of a 'penyeduk tanah', bone pieces, nine blood stains, six fingerprints, cut wires, cigarette butts, a cricket bat, soil samples, a container with liquid explosive and a cut stained cushion. The DNA of Hisham was later detected on the cricket bat (P118B). These discoveries are recorded in Vol 2h pp 1545–1546 of the appeal record;

C**D**

(b) the second piece of information relates to the information given on 12 September 2010, where about 3pm after SP32 had 'temubual' the fourth accused, he was led by both the second and the fourth accused persons to Sungai Panchau. There SP32 found items like a knife, bone fragments, wires, keys, metal parts, and a plastic bag with the words 'Tapioca starch, super high grade, 50 kg' printed on it. They were discovered in the river. We maintain the usage of the word 'temubual' as this was the word used by SP32 in the course of the court's proceedings. Furthermore, there was no serious challenge as regards the use of that word;

E**F**

(c) the third piece of information was obtained on the same day (ie 12 September 2010) but at about 5.45pm. Pursuant to SP32's 'temubual', the second accused and the fourth accused led him to Kunci Air Pasar Besar, Banting where two Blackberry handphones, one white and one black, were discovered. The white Blackberry handphone (P39B) was owned by Kamil as confirmed by SP14 (his wife). The black Blackberry handphone (P28A) was owned by Hisham as identified by SP8 (his wife);

G**H**

(d) the fourth piece of information was obtained on 13 September 2010 at 3pm after SP32 had 'temubual' both the fourth accused and SP29 at the IPD Kuala Langat. At about 3.30pm SP32 'temubual' the second accused and SP29. SP32 was then led by the second accused, the fourth accused and SP29 to Jambatan Kampung Endah, where a Seiko watch (P74A) was discovered. This watch was owned by Kamal as confirmed by SP97 (ASP Koh Fei Chiew);

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- (e) the fifth piece of information was obtained on 13 September 2010 at 6.20pm after SP32 had 'temubual' both the second accused and SP29. It led to the discovery of 14 pieces of burnt logs at a rubbish dump at Sungai Arak; A
- (f) the sixth piece of information was obtained on 14 September 2010 at about 11am SP32 was led by both the fourth accused and SP29 to Jambatan Sungai Kampong Endah where a Bell & Ross watch (P42A) was discovered. This watch was owned by Kamil as identified by SP14 ('Kamil's wife'); and B
- (g) the seventh piece of information was also obtained on the same date ie on 14 September 2010 at about 5.05pm. Pursuant to SP32's 'temubual', the second accused and SP29 led him to Sungai Ladang, Kelapa Sawit, Jalan Kenangan where six pieces of zinc sheets (P75A–P80A), with the help of divers, were discovered. SP86 (chemist) found traces of blood namely H16 and H17 respectively on zinc sheets P80A and P78A. The traces of blood on P80A were found to be those of Kamal. The traces of blood on P78A matched the DNA profile of Kamil's family. C

[104] In a nutshell, SP32 testified that the second and fourth accused persons at the abovementioned times and dates had given information leading to the discovery of the items. D

[105] If the above evidence of discovery were accepted, they would support the prosecution case of the involvement of the second and fourth accused persons in the murder of Sosilawati and the three others. As will be discussed later, these items discovered fall under 'circumstantial evidence'. E

[106] We will deal first with the admissibility of the information given by the second and fourth accused persons under s 27 of the EA. In his grounds of judgment the learned trial judge stated that the information was given individually though questioned jointly. The learned trial judge was satisfied that SP32 had no prior knowledge of the scene of crime or the items discovered. SP32 would not have discovered them had it not been for the information supplied by the second and fourth accused persons. F

[107] The Court of Appeal rejected the s 27 evidence on the basis that the information given by SP29 and the second and fourth accused persons were made jointly. It opined that s 27 of the EA does not contemplate joint statements by more than one accused. G

[108] The Court of Appeal nonetheless had opined that the acts of the second and the fourth accused persons in leading SP32, and pointing, to the places where the items were discovered amounted to conduct under s 8 of the EA. H

A [109] Section 27 of the EA reads as follows:

When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

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[110] In *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630; [2013] 4 CLJ 149, Ahmad Maarop FCJ at p 646 (MLJ); p 167 (CLJ), speaking for this court said:

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[28] In the light of the authorities referred to, we hold that information admissible under s 27 of the Evidence Act includes accused's statement, or his act or conduct such as pointing out which leads distinctly to the discovery of a fact. For such information to be admissible in evidence, there is no duty on the prosecution to prove the voluntariness of the information. Hence it is not necessary to conduct a

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trial within a trial to determine the voluntariness of the information.

[111] We have no reason to depart from the above principle of law. The act of the learned trial judge in undertaking the TWT exercise was an unnecessary and waste of judicial time.

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[112] Further, as to the approach in dealing with the evidence under s 27 of the EA, we are of the considered view that the correct test was applied in *Krishna Rao Gurumurthi & Anor v Public Prosecutor and another appeal*, and adopted in *Public Prosecutor v Azilah bin Hadri & Anor*, as propounded in *Chong Soon Koy v Public Prosecutor* [1977] 2 MLJ 78. Suffian LP had formulated the twin tests which read as follows:

F

... What was the fact discovered? The fact discovered embraces the place from which the pistol and ammunition were produced and the knowledge of the accused as to this.

G

What was the information supplied by the accused relating distinctly to the facts thereby discovered? It was 'information with regard to a firearm and some ammunition which he had hidden in the Berapit Hills in Bukit Mertajam' in the words of Mr Ong. All that evidence is admissible ...

H

[113] In the present case, the fact discovered embraces the area near the farm where the items were discovered by the police. The information given by the second and fourth accused persons indicates their knowledge of the place and the items.

I

[114] The most cogent argument forwarded by the second and fourth accused persons was that they had made a joint statement, an issue which was not contemplated by s 27 of the EA. We were referred to by learned counsel for the parties of the case of *Govind Krishna Jadhav v State of Maharashtra* (1980) 82

BOMLR 173, where it stated:

... The joint statement is a statement made by two persons simultaneously. Such a situation is practically inconceivable especially with reference to section 27 of the Evidence Act. Two or more persons cannot in chorus make a statement contemplated by section 27. A joint statement must in practice mean the same statement or similar statements made by two or more persons. In such a case only the statement which is made earlier and which leads to the discovery will be admissible under section 27 of the Evidence Act and the subsequent statement or statements will not be.

[115] In reply, it was submitted by the prosecution that even though the second and fourth accused persons provided the information that led to the discoveries, there was no evidence whatsoever establishing that both of them had given joint statements.

[116] However, in the present case before the need arises to discuss the legal issue, whether a joint statement made by the second and fourth accused persons is contemplated or otherwise under s 27 of the EA, we are of the view that we should first satisfy ourselves whether a joint statement was indeed made by them. If no joint statement was made then the matter ends there.

[117] A scrutiny of the appeal record shows that the learned trial judge in his grounds of judgment in no uncertain terms had found that the information, which led to the discovery, was given individually though questioned jointly. This confirmation was elicited from SP32.

[118] Since we have already accepted that SP32 is a credible and reliable witness, we therefore hold, as testified by SP32, that there was no evidence of a joint statement having been made by the second and fourth accused persons. This alleged joint statement issue must therefore be rejected.

[119] We now deal with the question of whether the version of the discovery statement put forward by SP32 was accurate enough to be acted upon. In *Krishna Rao Gurumurthi & Anor v Public Prosecutor and another appeal*, the Court of Appeal said this:

Accordingly, the first question that a court must ask itself is this: Did the accused ever make a discovery statement? This turns on the credibility of the policeman who gives evidence of the discovery statement. If the court is satisfied that the first question must be answered in the negative, that is to say, that the alleged statement is a fabrication, then that is the end of the matter and no further steps in the inquiry are necessary. But if the court decides that the first question should receive an affirmative response, then it must ask itself the second question. Is the version of the discovery statement put forward by the policeman giving evidence of it accurate

- A enough to be acted upon? If the accuracy of the statement is in doubt then it should be rejected. Otherwise it should be accepted.

(The tests above have been affirmed by the Federal Court in *Md Zainudin bin Raujan v Public Prosecutor* [2013] 3 MLJ 773.)

- B [120] As we are satisfied that the second and fourth accused persons had given information separately to SP32 and had led the police to the areas near the farm where items connected to the murder were discovered subsequently, we find that the statement which led to the discovery was accurate. Accordingly,
- C contrary to the finding of the Court of Appeal, we are inclined to agree with the learned trial judge that the s 27 evidence is admissible.

- D [121] We are equally satisfied that, if not for the information supplied by the two accused persons, the police would not have successfully completed the investigation (*Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389; *Public Prosecutor v Hashim bin Hanafi* [2002] 4 MLJ 176).

- E [122] There was also no plausible reason why the police would have play-acted the discovery of the items.

ISSUE OF CONDUCT — SECTION 8 OF THE EA

- F [123] We now address the submissions of parties regarding the issue of conduct. This section reads as follows:

8 Motive, preparation and previous or subsequent conduct

(1) ...

- G (2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

- H Explanation 1 — The word ‘conduct’ in this section does not include statements unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2 — When the conduct of any person is relevant any statement made to him or in his presence and hearing which affects his conduct is relevant.

- I [124] The Court of Appeal in its judgment (para 22) on this issue in clear terms agreed with the learned trial judge that the acts of the second to the fourth accused persons in taking SP32 and pointing to the places where the items were discovered, amount to conduct which is admissible under s 8 of the EA.

- [125] Learned counsel for the second and fourth accused persons before us submitted that the evidence of SP32 regarding them pointing to the location which led to the discovery of the abovementioned items did not inspire confidence; therefore the evidence of their conduct pointing to the locations and implicating them was completely unreliable and must be rejected. Alternatively, it was submitted that even if both accused persons did indeed point in the direction of the items, those acts of pointing did not irresistibly connect them to the murder of Sosilawati and the three others. A
B
- [126] We hold the view that, like the s 27 issue, SP32's credibility likewise plays a major role in the s 8 issue. As the second and fourth accused persons have failed to successfully challenge the credibility of SP32 in relation to the s 27 issue, that finding also holds him in good stead regarding the conduct issue vis a vis the second and fourth accused persons. C
- [127] At any rate it is apposite to clarify here that even if information pursuant to s 27 of the EA is found inadmissible, that piece of inadmissible evidence does not automatically affect the admissibility of the evidence of subsequent conduct under s 8 of the EA (*Amathevelli a/p P Ramasamy v Public Prosecutor* [2009] 2 MLJ 367; [2009] 3 CLJ 109; *Prakash Chand v State (Delhi Administration)*). D
E
- [128] That conduct of pointing to the places where the items were discovered by the second and fourth accused persons, which was subsequent to an offence, falls squarely within the ambit of 'the conduct of any person an offence against whom is the subject of any proceeding'. F
- [129] As held by the Court of Appeal, we hold that the conduct of pointing to the places where the items were found is relevant and admissible (*Prakash Chand v State (Delhi Administration)* 1979 AIR 400). Chinnappa Reddy J said at p 404: G
- The evidence of the circumstances, simpliciter, that an accused person led a Police Officer and pointed out the place where stolen articles or weapons which might have been used in the commission of the offence were found hidden, would be admissible as conduct, under section 8 of the Evidence Act, irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of section 27 of the Evidence Act ... H
- [130] The conduct of the second and fourth accused persons is consistent with them knowing of the places where the items connected to the crime of murder were disposed of. This view is consistent with the view held by the learned trial judge where he said: I

A The only inference that I could make on the conduct of the second and fourth accused in providing the information in this case was that they were in possession of the items found and had tried to destroy and conceal these items by scattering and leaving them at various places.

B [131] We are also satisfied that the act of pointing by the second and fourth accused persons at the spots where items connected to the murder were found is admissible as conduct, as provided for under s 8 of the EA.

ON DNA EVIDENCE

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D [132] In respect of the issue on DNA evidence in the present case we noted that the emphasis by learned counsel for the accused persons was only in connection with the discovery at the farm of a cricket bat with blood droplets (P118B) and bloodstains on the walls of the rooms where the second and third accused persons stayed (with cotton swabbings done) and also on the zinc sheets (P75A, P78A and P80A). The findings were incorporated in P600 as the DNA report by SP86. In essence SP86 found that the DNA identified from the blood droplets on P118B matched the blood of Hisham's biological mother, father and children. The bloodstains found on P75A and P78A matched that of Kamil and P80A that of Kamal. The testimony of SP86 and P600 were challenged on the ground of hearsay evidence.

E
F [133] On this aspect of the evidence the learned trial judge found, inter alia, that:

G There was also a cricket bat pointed out by the second and fourth accused at the farm at the place where the third accused stayed. On the cricket bat there were suspected blood droplets on which cotton swabbing was done. Similarly cotton swabbing was done on the walls of the rooms where the second and third accused stayed on the farm.

H ...
When the chemist SP86 did an analysis of all the swabs taken from the zinc as well as the cricket bat and the walls, they clearly matched the DNA to the three members of Sosilawati's entourage. SP86's expertise on DNA analysis to me was unmatched as he had done numerous such analyses and had the necessary qualification as well had acquired adequate knowledge over the years to do such analysis.

I ...
On of the grounds expressed by the defence against the DNA results obtained was (sic) the reading on the equipment did not comply with the manufacturer's specification. According to SP86 the equipment in the PJ Chemistry Department was set at RFU reading of 50 which was different from that recommended by the manufacturer. According to SP86 this did not go against the International standard

in setting the equipment. Each lab was at a liberty to set the standard of the equipment deemed proper. In the absence of any evidence to the contrary I accepted the explanation on this issue.

A

Putting to rest the issue of DNA analysis it was my finding that proper procedures had been followed in not only analysing the swab samples taken but also in taking the blood samples from the related persons.

B

[134] The Court of Appeal agreed with the findings of the learned trial judge on the issue and said this:

[143] The Director of the Forensic Division department and also the Head of Forensic DNA Serology Section, Chemistry Department, Lim Kong Boon (SP86) had analysed the blood/tissue sample from the cricket bat and swabs from the wall of a premise in the farm. SP86 found that the cricket bat had a DNA of Hisham and that the DNA on the Swab 9 from the wall matched that of immediate family members of Hisham. The zinc sheets were also analysed where the result revealed that three zinc sheets exhs P80A, P78A and P75A had the DNA of Kamal and Kamil. The complaint of the appellants was that the evidence of SP86 was hearsay as his assistants or lab assistants did the 'ground work' for him.

C

D

[144] SP86 had specifically testified that the officers who had assisted him in this case were under his close supervision and under his strict instructions. SP86 gave oral evidence as regards his analysis and he tendered his report exh P600. It is an established principle of law that the chemist is not required to go into details of what he did in the laboratory step by step. So long as the chemist is able to give credible evidence to support his opinion, the court is entitled to accept such opinion unless there is in rebuttal an opinion of another expert (see *Munusamy v PP* [1987] 1 MLJ 492). In the instant case, there is no rebuttal expert evidence. We therefore disagree with the appellants that the evidence of SP86 is hearsay and inadmissible. In our view, the fact that the chemist is assisted by other officers does not ipso facto render the evidence of the chemist hearsay. And we find no reason to depart from the findings of the learned trial judge who had accepted the evidence of SP86.

E

F

G

[145] As to the presence if unknown male DNAs on the cricket bat and the cigarette but as well as fingerprints, we take note that the farm is on open place and there are other occupants residing at the farm. The existence of unknown male DNAs on the cricket bat and the cigarette butts is immaterial. It does not negate the fact that the DNA of Hisham was on the cricket bat which shows that Hisham was at the farm and the presence of blood irresistibly points to the fact that the bat was used on Hisham. Similarly the DNA of Kamal and Kamil found on the zinc sheets which were recovered as a result of the second appellant and Suresh showing the place of recovery to the police provided the link or nexus between Kamal and Kamil to the appellants. This evidence shows that at least these three victims were at the farm.

H

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[146] As for the contention that there was cross-examination of the exhibits, we find no evidence that the integrity of the exhibits had in fact been compromised such that the results of the analysis by the chemist and/or the medical officers are vitiated.

- A** [135] Before us learned counsel for the first accused, supported by learned counsel for the second and third accused persons, submitted that P600 should not have been admitted in evidence on the ground of hearsay for the following reasons:
- B** (a) that SP86 admitted under cross-examination by learned counsel for the first accused that he was not the person who actually carried out the entire analysis upon which P600 was based; and
- (b) that the scientific officers and other laboratory officers who conducted the various tests were never called to testify during the trial.
- C**
- [136] Learned counsel for the third accused in supporting the contention of learned counsel for the first accused submitted the following additional reasons:
- D** (a) that the DNA profiles which were developed from the zinc sheets and cricket bat were degraded and therefore could not produce complete results;
- (b) that there was possibility of cross-contamination and secondary transfer of the DNA evidence looking at the manner the zinc sheets were collected, packaged and preserved. Some of the zinc sheets, when discovered, were wet, they ought to have been thoroughly dried before they were packed to prevent degradation of any biological evidence;
- E**
- (c) that the threshold (Relative Fluorescent Unit (RFU)) used in this case was not in accordance with the manufacturer's recommendation of the machines that SP86 or his officers utilised to carry out the analysis;
- F**
- (d) that the farm on which the DNA evidence was discovered was never secured or guarded by the police from the date of arrests of the second, third and fourth accused persons. The failure to secure or guard the alleged crime scene had serious implications or consequences in relation to the acceptance, probity and probative value of the exhibits/evidence discovered during that interval of 9–12 September 2010;
- G**
- (e) that the prosecution was not able to rule out the possibility that the evidence discovered on 12 September 2010 might have been compromised or that the evidence could have only surfaced or appeared after 9 September 2010;
- H**
- (f) that the worst part of it was the prosecution's failure to call other occupants of the farm who continued to stay on the farm during that period; and
- I**
- (g) that none of the DNA evidence could relate back to the guilt of the third accused. The locations from which the zinc sheets, for instance, were discovered, were pointed out or led by the third accused. In fact there

was no solid evidence to implicate the third accused in the commission of the crime, other than being at the farm on the fateful date.

A

[137] As stated earlier the main thrust of the submissions of learned counsel for the accused persons is that P600 should not have been admitted on the ground of hearsay evidence. They said that those laboratory officers should have been called to testify on their roles in conducting the tests and analyses. Learned counsel for the first accused went on to submit that just because those laboratory officers were under supervision and instruction did not mean that they actually complied with 'the strict controls and regimes necessary in DNA testings'. As such if those officers were called to testify they would have been subject to cross-examination on what and how the tests were done.

B

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[138] With respect, such argument ignores the point that DNA evidence is admissible under ss 45, 46 and 51 of the EA. It is basically opinion evidence of an expert. And generally experts rely on test results and data that are not necessarily obtained or conducted by them personally in coming up with their opinion. It is more of them examining and interpreting those test results and data presented before them.

D

E

[139] In *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293 this court said this at para 172:

When considering whether we should accept PW5 and PW6's evidence, we must first conclude that their evidence would fall under that of an expert's opinion, and we have no doubt they are experts. As regards the opinion of an expert, it was observed in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 as follows:

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... the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step,

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(*Public Prosecutor v Lam San* [1991] 3 MLJ 426; [1991] 1 CLJ Rep 391 and *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265; [1994] 2 CLJ 151).

H

[140] Under English law the general rule is that expert evidence is admissible provided that it is reliable and relevant. Reliability and admissibility of DNA evidence have been discussed in several cases such as *R v Doheny and Adams* [1996] Lexis Citation 5150; [1996] EWCA Crim 728 and *R v Broughton* [2010] EWCA Crim 549.

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[141] In Singapore, ss 47, 48 and 53 of the Singapore Evidence Act (Chapter 97) are relevant in considering the admissibility of expert evidence

A while s 62 of the same Act deals with the hearsay rule as applicable in Singapore.

[142] There is no clear provision in the Singapore Act or any court decision that allows an expert witness to rely on test results and data obtained by another person. Only a view has been expressed that 'In practice, an expert will not have himself performed all the experiments or asked all the questions or conducted all the interviews personally of the person under examination and may be relying on the hearsay of his assistant or employee. But the courts may take the view that there is no reliance on hearsay of an assistant or employee where the assistant or employee was under the supervision of the expert' (see *Halsbury's Laws of Singapore* Vol 10 (2000) para 120.255 at p 339).

[143] In respect of ss 48 and 53 of the Singapore Act, there are at least two views on their interpretations. The first view is that on plain reading of s 48 which provides that 'Facts not otherwise relevant are relevant if they support or are inconsistent with the opinions of experts when such opinions are relevant' and s 53 which states that, 'Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant', they 'appear to be wide enough completely to circumvent the stipulation for direct evidence in s 62 by rendering any evidence admissible so long as it forms the grounds of the expert's opinion or tends to confirm or undermine his opinion'. The second and preferred view is that 'these sections do not punch such a large hole in the direct evidence rule found in s 62(1). Since an opinion is valueless unless the grounds on which it is based are known, these sections should be seen as merely being a necessary corollary to the admission of expert evidence under s 47. The evidence admitted under these sections is admitted merely to reveal the basis of the opinion and can be used only to bolster or undermine the credibility of the opinion. Such evidence is not admitted to establish the truth of those facts, which must be proven by other, admissible evidence'. Hence, the concluding view is that 'a failure sufficiently to prove facts underlying an expert opinion will affect only the weight accorded to the opinion. Even if the failure to prove the foundational facts is so extensive as to deprive the opinion of any basis at all, the opinion will thereby be rendered useless and irrelevant, rather than inadmissible' (see *Report of the Law Reform Committee on Opinion Evidence*, October 2011 Singapore Academy of Law; *Gunapathy Muniandy v Dr James Khoo* [2001] SGHC 165).

[144] In other words, facts underlying an expert opinion are not inadmissible on the ground of hearsay. Rather, the failure to sufficiently prove those underlying facts would only affect the weight to be given to such expert opinion.

[145] Having therefore considered the submissions of learned counsel for the accused persons and the legal principles on DNA evidence as applicable in this

country and in other jurisdictions, we are in agreement with the view of the Court of Appeal that there is no basis to say that the findings and testimony of SP86, and P600, should not have been admitted on the ground of being hearsay evidence. P600 is a scientific report by SP86, an unchallenged expert, derived from his examination, analysis and interpretation of the test results and data secured by his officers directly under his supervision. As such we are of the view that there is no necessity for the prosecution to call each and every laboratory officer assigned and supervised by SP86 to carry out the required tests upon which P600 was premised. The crucial part was the examination, analysis and interpretation on those test results and data carried out by SP86 in producing P600. In fact there was no challenge made on the method adopted by SP86. During the trial there was also no allegation of unreliability of any of the test results and data secured by the laboratory officers.

[146] Moreover, there was no rebuttal expert called by the accused persons to challenge the test results and data interpreted by SP86.

[147] Accordingly, we find no merit on this issue as raised by learned counsel for the first, second and third accused persons.

MOTIVE

Prosecution submission on motive

Cheques (P162 and P163)

[148] The prosecution contended that the motive for the murder can be inferred from the following facts. The evidence of SP15 showed that the purpose of Sosilawati's visit to Banting was to meet the first accused to expedite payment for the two cheques totalling RM4m, as she wanted the money to give bonus to her staff and as expenses for the upcoming Hari Raya Aidilfitri.

[149] In this connection, the prosecution adduced two Hong Leong Bank cheques in the sum of RM1m (P162) and RM3m (P163). Both cheques were dated 9 September 2010 ie one day prior to Hari Raya Aidilfitri. The cheques were issued by 'Pathmanabhan a/l Nallianen', the first accused, under account No 04100025376 to be paid to 'Southern Symphony Sdn Bhd' (Sosilawati's company).

[150] The prosecution submitted that according to Yvonne Tiong Guat Choo (SP98) the Operation Manager at Hong Leong Bank, as at 30 August 2010, the balance in the first accused's account (04100025376) was RM1,383,943.85. In other words, the first accused had insufficient funds to clear the two cheques

A amounting to RM4m or even RM3m if those cheques were to be presented for payment before Hari Raya Aidilfitri or on 30 August 2010.

B [151] The first accused was thus under financial pressure to come up with the money and the solution was to get rid of Sosilawati and the three others. The prosecution submitted that, in the circumstances, the issue of motive is relevant to the case. The motive being the insufficient funds in the first accused's account to honour the cheques totalling RM4m issued to Sosilawati.

C [152] The prosecution submitted that this piece of evidence remained unchallenged as the first accused failed to explain the issue of insufficient funds. It was contended that at the defence stage, the first accused failed to explain how he could have honoured the cheques issued to Sosilawati.

D *Defence submission on motive*

The cheques (P162 and P163)

E [153] Learned counsel for the first accused submitted that the first accused owed no money to Sosilawati and the cheques did not represent sale proceeds of any land in Penang. The prosecution led no evidence to show that there had been a sale of land in Penang by Sosilawati in 2010 or that the money had come in from such a sale and was due to her.

F [154] Learned counsel for the first accused further submitted that the prosecution misled the learned trial judge and hence the learned trial judge erred in his findings in calling for the defence when he stated:

G ... the first accused had no money in his account to honour the cheque issued to Sosilawati as payments for the sale of land in Penang. This to me was a very compelling reason to kill Sosilawati. I find that this motive was more probable motive leading to the killing of Sosilawati; and

The amount of the cheque represented part payment of the sale of the Penang land.

H [155] Learned counsel for the first accused submitted that the prosecution tried to make a meal of photocopies of cheques without realising that the first accused's personal account on which the cheques were issued had been frozen. No evidence was led by the prosecution to show that there were no arrangements for facilities or overdrafts in the first accused's personal account, and thus nothing turns on the cheques. He contended that the cheques were just mere post-dated cheques for loans. Similarly, he submitted that the Court of Appeal would not have come to the same findings had it properly evaluated this evidence.

I

[156] Learned counsel for the first accused further submitted that the first accused owed no money to Sosilawati and in fact the 10% deposit she received in respect of the land in Penang had been disbursed to her, Suhaimi and Saberi since 2008. He submitted that the investigating officer ('IO') ASP Mohamad Ishak bin Yaakob (SP99) confirmed that Sosilawati was involved in a Penang land transaction where the first accused was the solicitor. The transaction was through a company called Southern Symphony. The prosecution led no evidence concerning this company. There is no evidence to suggest that there was anything irregular or illegal about the land transaction. He submitted that the land had been sold to Ample Quality Sdn Bhd ('AQSB'). Rahman Palil, Lee Lai Heng and Sukumaran were the shareholders and directors of AQSB. Southern Symphony confirmed receipt of RM2.9m. Therefore, Sosilawati had already received the money.

A

B

C

[157] Learned counsel for the first accused submitted that there was a letter dated 2 August 2010 from Lee Lai Heng, Rahman Palil's business partner, concerning the proposed sale of the land in Penang of which matters SP99 chose not to investigate. He submitted that AQSB (Rahman Palil's company) had only paid RM2.9m as 10% deposit to Sosilawati, but was negotiating to sell the land for RM200m — an anticipated profit margin of approximately RM171m. He also submitted that SP99 agreed that in August 2010 the land was still Sosilawati's and if Sosilawati were to pull out, then AQSB (Rahman Palil's company) stood to lose millions of Ringgit.

D

E

[158] Learned counsel for the first accused further submitted that the IO (SP99) knew that Sosilawati attended a function in the evening of 28 August 2010. It was suggested to SP99 that Sosilawati was seated next to Rahman Palil at the function. SP99, however chose not to investigate. He concluded by saying that the suggested meeting between Sosilawati and Rahman Palil on 28 August 2010, just two days before she was alleged to have disappeared, should assume great significance.

F

G

[159] Learned counsel for the first accused also submitted that, premised on the evidence before the court, there is no evidence of motive on the part of the first accused to be rid of Sosilawati and the three others. He said that the two cheques according to the first accused were merely for a loan from the first accused to Sosilawati and that even assuming he did not have sufficient funds to honour the two cheques that was not sufficient reason to impel him to commit the murder.

H

I

[160] Section 8(1) of the EA stipulates that motive is a relevant fact. It reads:

8 Motive, preparation and previous or subsequent conduct

- A (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.
- ...
- B [161] Ratanlal & Dhirajlal's, *Law of Crimes, With List of Malaysian Cases*, (24th Ed) Vol 2, at p 1391 summarises the law on motive in the following words:
- C 158. Motive is the ultimate end which a person hopes to achieve whereas intention is the immediate effect of his act. Motive is something which prompts a person to form an intention. The motive behind a crime is a relevant fact on which evidence can be given. Absence of motive is also a circumstance which is relevant for assessing the evidence. Proof of motive satisfies the judicial mind about the authorship of the crime but the absence does not ipso facto result in the acquittal of the accused. Motive is not a sine qua non to prove the case of the prosecution. Absence of proof
- D only demands deeper forensic search and cannot undo the effect of evidence if otherwise is reliable and sufficient.
- E [162] In *Molu And Ors v State of Haryana* AIR 1976 SC 2499, the Indian Supreme Court aptly observed:
- F It is well settled that where the direct evidence regarding the assault is worthy of credence and can be believed, the question of motive becomes more or less academic. Sometimes, the motive is clear and can be proved and sometimes, however, the motive is shrouded in mystery and it is very difficult to locate the same. If, however, the evidence of eye witnesses is creditworthy and is believed by the court which has placed implicit reliance on them, the question whether there is any motive or not becomes wholly irrelevant.
- G [163] The Court of Appeal in *Abdul Samid bin Edward v Public Prosecutor* [2015] 4 MLJ 58; [2015] 4 CLJ 149 made similar remarks which read:
- H Although motive was an important element to look out for when relying on circumstantial evidence to convict an accused, it was not in our view, an absolute must, in the sense that, an absence of an established 'motive' would exculpate the accused from the charge proffered against him, notwithstanding all other evidence which points to the accused being guilty of the crime charged.
- I [164] Similarly, Sinha J in *Atley v State of Uttar Pradesh* AIR 1955 SC 807 at p 810 stated:
- Where there is clear proof of motive for the crime that lends additional support to the finding of the court that the accused was guilty but the absence of clear proof of motive does not necessarily lead to the contrary conclusion. If the prosecution has proved by clear evidence that the appellant had reasons of his own for getting his first wife out of the way, that would have lent additional assurance to the circumstantial evidence pointing to his guilt. But the fact that the prosecution has

failed to lead such evidence has this effect only, that the other evidence bearing on the guilt of the accused has to be very closely examined.

A

[165] We wholly endorse the observations made above in that motive is an important factor but not an ingredient of an offence to be proved in cases which turn on circumstantial evidence as in the present case. That said, it does not mean that where evidence of motive is vague, non-existent or not clear, an accused is exculpated provided there is sufficient evidence pointing to his guilt.

B

[166] Having considered the matter, we agree with the defence that evidence of motive as adduced by the prosecution is far from being satisfactory. At one stage, the prosecution contended that the unavailability of sufficient funds in the bank account of the first accused was the motive for the murder of Sosilawati and the three others. Later, the prosecution referred to the Penang land transaction as the motive behind the murder. In the circumstances, we hold that the evidence as regards motive is far too equivocal to be of any value.

C

D

[167] However, as said earlier, motive may be helpful in assisting the court in coming to its decision but the absence of such evidence is not fatal to the prosecution case (see *Bhikari Behera v State of Orissa* 1995 CriLJ 2998 at p 3000; and *Rangi Lal And Ors v State of UP* 1991 CriLJ 916 at p 921).

E

[168] With that observation at the forefront of our minds, we now move to consider the circumstantial evidence before us in greater detail.

F

CIRCUMSTANTIAL EVIDENCE

[169] Having dealt with the issues raised by the defence before us, we now turn to the issue of whether the convictions of the accused persons are safe premised on the circumstantial evidence before the court.

G

[170] As stated earlier, the bodies of Sosilawati and the three others in relation to whose murders the four accused persons were charged under s 302 read with s 34 of the Penal Code were never found.

H

[171] Not a single witness gave evidence of having seen the deceased bodies of Sosilawati and the three others, or of having seen them being inflicted with injuries leading to their demise.

I

[172] In other words, the incriminating evidence against each of the four accused persons if any was wholly circumstantial in nature.

- A [173] The law is well settled on the standard of proof required in criminal cases where the evidence presented before the court to prove the commission of the offence by the accused person is circumstantial in nature.
- B [174] In *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307, Thomson CJ, said that ‘... where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope’.
- C [175] In *Ahmad Najib bin Aris v Public Prosecutor* [2007] 2 MLJ 505; [2007] 2 CLJ 229, Abdul Aziz Mohamad JCA (as he then was), delivering the judgment of the Court of Appeal said:
- D ... As to what circumstantial evidence is, it is needful to quote only that part of the summing up to the jury that is set out in *Idris v Public Prosecutor* [1960] MLJ 296 at p 297; [1960] 1 LNS 40:
- E With regard to the definition of circumstantial evidence I can give you no better definition than quote to you the words of Lord Cairns in the case of *Belhaven & Stenton Peerage* reported in 1875–6 Appeal Cases, p 279:
- F My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.
- G In other words circumstantial evidence consists of this: that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps then it is of no use at all ...
- H [176] In his judgment, the learned trial judge found that there was sufficient evidence to support findings of guilt against all the accused persons. He stated:
- (b) Circumstantial Evidence
- I [186] Circumstantial evidence as opposed to direct evidence is allowed and regarded as sufficient under the law to prove a case and sustain a conviction. To me direct evidence for the purposes of this case would be where a witnesses testifies seeing an offence happening before his eyes. There was such a witness in this case in the form of SP59 but unfortunately his evidence was discredited in this case and his admission to the facts of seeing Sosilawati and company being killed in another proceeding could not be considered as direct evidence for the purposes of this case.

[187] The court was therefore left with circumstantial evidence in determining whether the prosecution had proven a prima facie case. What amounts to sufficient circumstantial evidence was very aptly put by Lord Cairns in the case of *Bel Haven & Stenton Peerage* as quoted in the case of *Ahmad Najib bin Aris v Public Prosecutor* [2007] 2 MLJ 505; [2007] 2 CLJ 229 as follows:

My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united form of all the circumstances put together. You may have a ray light so feeble and that by itself will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavoring to dispel.

...

[267] As a final piece on this issue I was satisfied that the facts contained in P711 and P712 were cogent evidence against the accused but on its own were insufficient to sustain a conviction against the accused. I would in fact go as far to say that even without P711 and P712 the prosecution had led sufficient circumstantial evidence against the accused.

[177] The Court of Appeal agreed with the findings of the learned trial judge and made the following observations:

[69] In the final analysis, the learned trial judge found that the circumstantial evidence led by the prosecution was sufficient to prove its case beyond reasonable doubt. The appellants were thus convicted and sentenced to death.

[70] Aggrieved by the convictions and sentences, the appellants appealed to this court.

The Appeal

[71] Learned counsel for the respective appellant had put up an extensive written and oral submission. To avoid repetition, they had each submitted on specific issues and in so doing had adopted the submission of the other. We noted that essentially the complaint in this appeal was directed at the findings of the learned trial judge at the end of the prosecution case where it was submitted that the prosecution had failed to make out a prima facie case against the appellants; that the prosecution led no evidence, direct or circumstantial, that the four alleged victims named in the charges are dead or have been murdered, and if so, how, when, where, why and by whom.

...

Conclusion

[185] It is our judgment that at the end of the prosecution case, the learned trial judge had correctly called for the defence. From the direct evidence of family members, friends and SP33, taken together with the circumstantial evidence in the form of the CDRs, the forensic and the DNA evidence which established the presence of Sosilawati and company at the farm, it could be safely inferred that Sosilawati and company had met their deaths at the farm. The knowledge that the

- A second, third and the fourth appellants had of the places where the incriminating items were found and their conduct in showing those places to the police is a definite pointer towards the guilt of the appellants.
- [186] The phone calls from Kamil and Hisham that Sosilawati had problem with her driver, Kamal and that they would be going to Genting Highlands for three days was a version that is difficult to believe, incredible and improbable. It was the holy month of Ramadhan and it was highly unlikely that they would at the spur of the moment, decide to go to Genting Highlands. And why Genting Highlands to sort out the alleged problem that Sosilawati had with Kamal? In our view, it is more probable that they were forced to make the calls to deviate the attention from the first appellant and Banting.
- C [187] At the conclusion of the trial, we are satisfied that the prosecution had proved its case against the appellants beyond reasonable doubt. The evidence of the fourth appellant corroborated SP33 in material particulars. In fact, the evidence of the fourth appellant had strengthened the prosecution case. We do not lose sight of the fact that the DNA of Sosilawati was not found on either the cricket bat, the swabs of bloodstains on the wall or on the zinc sheets.
- D [188] Notwithstanding the above, we are of the view that the inferences to be drawn from the facts and circumstance of this case unerringly lead to the conclusion that within all human probability, Sosilawati is dead and that the appellants were the perpetrators leading to her death as well as the death of Kamal, Hisham and Kamil. The principles set out in *Sharad Birdhichand Sarda*, in our view, had been met by the prosecution.
- E [189] Taking the evidence cumulatively, we find that the convictions of the appellants are safe. We therefore unanimously dismiss the appeals and we affirm the convictions and sentences of the appellants.
- F

Our findings on the circumstantial evidence

- G Were Sosilawati and the three others at the farm?
- [178] In our view, what must first be established is that Sosilawati and the three others were at the farm during the time stated in the charges. We will now scrutinise the evidence.
- H Evidence by friends and family of Sosilawati and the three others of their going to Banting on the day in question
- I [179] Evidence of Sosilawati and the three others going to Banting on the day in question may be gathered from the following witnesses who are family members of Sosilawati and the three others. First, the evidence of SP16. SP16 gave evidence that she accompanied Sosilawati to Johor Bahru on Wednesday, 25 August 2010, and Sosilawati told her that she was going to meet the first accused on Monday in Banting to change the cheques given to her by the first

accused as the cheques were post-dated to a date after Hari Raya. Sosilawati asked SP16 to accompany her to meet the first accused, subject to subsequent confirmation by Sosilawati. A

[180] SP16 waited for Sosilawati to call and when there was no call she assumed that Sosilawati did not need her company to Banting. SP16 then called Sosilawati around 5pm on the day in question and was told by Sosilawati that she was already on the way to Banting. Sosilawati informed SP16 that she was with Kamal, Hisham and Kamil. B

[181] Further, Junaidah bt Ismail ('SP13'), a friend of Sosilawati gave evidence that on the night of 29 August 2010 Sosilawati by telephone told her that she was going to Banting the next day. Sosilawati invited SP13 to go along with her but SP13 declined as she was unwell. C

[182] SP15 met Sosilawati in their office around 12 noon on the day in question and was told by Sosilawati that she was going to Banting to meet 'lawyer Pathma' that day, accompanied by Hisham and Kamil. Around 3pm, Sosilawati told SP15 that if the driver (Kamal) did not come, she (SP15) was to accompany her to Banting. But Kamal did come and Sosilawati left the office around 4pm. According to SP15 Sosilawati told her that she (Sosilawati) was in a hurry, so that they could break their fast in Banting. D E

[183] SP14 gave evidence that her husband (Kamil) had told her two days prior to the day in question that he was going to Banting with Hisham and Sosilawati with regard to a land matter. He called her again at 4pm on the day in question to remind her that he would not be breaking fast with her and family as he would be in Banting. F

[184] SP8 gave evidence that when her husband (Hisham) took her to her office in the morning on the day in question, he told her that he was going to Banting that afternoon with Kamil and Sosilawati to attend to Sosilawati's business. G

[185] SP7 gave evidence that Sosilawati stopped by the shop where she worked in Banting. The shop sold 'kerepek' and cakes. SP7's recollection was that Sosilawati stopped by around 4pm on the day in question and bought RM200 worth of 'kerepek' and cakes from the shop. She left around 5.20pm with her driver in a BMW car. H

[186] Chief Insp Mazli bin Jusoh ('SP25') who examined Sosilawati's black BMW with the registration No WTL 11, found several plastic packets of 'kerepek' and cakes in the car. SP25's evidence goes to corroborate the evidence of SP7 that Sosilawati bought 'kerepek' from her shop. I

- A [187] SP15 further testified that around 7pm on the day in question, Kamil called her and she asked Kamil where they were going to break their fast. Kamil replied 'entah mak engkau bawa pergi hutan mana entah'. He also said 'pokok kelapa sawit'. When SP15 asked where her mother was, Kamil told her that Sosilawati was in the car in front of him. The telephone was then passed to
- B Hisham who then told SP15 that he was in Kamil's car and that he parked his car in Section 7 in Shah Alam.
- C [188] From the evidence given by SP41, the CDRs kept by Celcom showed that a telephone call did take place at 6:53:46pm on the day in question between telephone No 0192266222 used by Kamil and SP15's phone number, although the record indicated that it was SP15 who called Kamil's telephone number. The CDR showed that the call was received when telephone No 0192266222 was within the Batu Laut site, which is in Banting.
- D [189] At 7:54:02pm a telephone call was made by Kamil's number to his wife's number (0192626226). The caller was then within the Batu Laut site. However, subsequent telephone calls to Kamil's number went direct into his voice mailbox.
- E [190] At 8:04:03pm a telephone call was made from Hisham's number to SP8's number. The CDR showed that the call site was Batu Laut.
- F [191] Telecommunication records kept by Celcom also showed that telephone calls were made on the day in question from the number used by Sosilawati (0192295153) to the number registered under the first accused's firm. The calls were made at 5:59:04pm and 6:01:25pm, respectively. The calls were captured by the TM transmitter in Banting.
- G [192] Telephone calls were also made on the day in question from Kamal's Digi telephone number to Kamil's number at 6:31:26pm and shown to have been received at a location in Jenjarom, in the Kuala Langat district.
- H [193] The CDR showed that Sosilawati and the three others around 7pm on the day in question were proceeding towards a location in the area of Banting/Batu Laut. The farm is located in Tanjung Sepat, in the same vicinity.
- I [194] SP33 gave evidence that around 7pm on the day in question she saw a woman with long wavy hair and wearing a blue jacket arrive at the farm together with three men. She could not see their faces as they were facing away from her.

[195] At about 9pm, SP33 heard the sound of a woman screaming, twice, one or two seconds apart. A

Finding

[196] From all the above evidence cumulatively only one irresistible inference can be made: that Sosilawati and the three others went to Banting and arrived at the farm around 7pm in the evening of the day in question. B

Were Sosilawati and the three others killed at the farm at the time stated in the charges? C

[197] SP33 gave evidence that on 29 August 2010 sometime after 3pm she saw a lorry entering the farm and deliver a number of logs. The logs were initially unloaded by SP29, the second accused and the third accused at the location she showed in P4(20). Around 5pm, she saw SP29, the second accused and the third accused moved the logs to the place marked 'A' on photograph P4(62). D

[198] According to SP33, in the morning of 31 August 2010 when she delivered drinks at the 'pondok rehat', she did not see the logs at the site. E

[199] SP33 also testified that on the day in question, before hearing the screams, Jesyntha (the fourth accused's wife) directed SP33 to prepare a pair of track bottoms, a brown sleeveless shirt, a brown and blue t-shirt with sleeves, shampoo, soap, powder, a towel and turmeric. These were wrapped up in newspaper and put inside a pail. Then the pail was placed outside behind the back door by SP33. F

[200] Around 1am (31 August 2010), SP33 said that she was instructed by Jesyntha to retrieve from the karaoke hut the items she had put outside earlier. On the way to the karaoke hut, she saw a huge fire at the back portion of the farm, near the house where she said the second accused lived. The fire reached the height of the oil palm trees. SP33 marked the site of the fire as 'A' on the sketch plan P111. G
H

[201] According to SP33, earlier, after midnight, she also saw through the glass window panes the fire as a huge reddish glow. She stated that the fire appeared to be blown by the wind. I

[202] In the karaoke hut, SP33 saw items strewn about. She saw a knife, turmeric mixed with water, a handphone battery, a damp towel and the brown shirt.

- A** [203] Supt Soo Mee Tong ('SP48') and his forensic team were called by SP99 to conduct investigations at the farm. He and his team went to the farm on 12 September 2010.
- B** [204] SP48 and his team found an area where burning was suspected to have taken place ('burn site'). That area was situated to the left rear part of the farm. This site, according to SP48, was the site shown in photographs P10(61–63). He saw goat droppings spread all over the site and they were covered with zinc sheets and pieces of wood. This site matched the site marked by SP33 as 'A' on the sketch plan P111.
- C** [205] SP48 and his team went again to the location on 14 September 2010, together with medical forensic officers, and conducted an examination of the burn site.
- D** [206] SP48 testified that he saw the oil palm leaves overhanging the burn site had signs of scalding ('layu') due to the effect of burning. Photographs P4(72) and (73) were shown to SP48 and according to him those photographs showed the effect of heat from a nearby source on the palm leaves. His evidence on the
- E** scalding was challenged in cross-examination but remained intact.
- [207] Photographs P3(98) and (99) were shown to SP48 during re-examination. These photographs indicated the presence near the suspected burn site of banana palms. SP48 said the leaves were banana shoots. On close
- F** examination, it can be seen that the trunks of the banana trees had been cut off at the top and new shoots had just begun to regrow. In our view, due to the time lapse between the date in the charges and the date the photographs were taken (about two weeks later) the presence of the banana shoots does not adversely affect the evidence of SP33 of having seen a huge fire at that site.
- G** [208] Hussein bin Omar Khan (SP51) gave evidence that on 13 September 2010 around 7pm he was asked by SP32 to follow the latter to an oil palm estate at Jalan Sungai Arak. There SP51 found a dumpsite with pieces of wood. He took possession of 11 pieces of wood which were burnt or partially burnt.
- H** The location of the dump site and the pieces of wood found there can be seen from the photographs in P12. The discovery of the pieces of wood lends credence to SP33's evidence of logs having been delivered to the farm on 29 August 2010 and of the fire on the night of the day in question.
- I** [209] SP48 also testified that during the site investigations at the farm they found, among others, a cricket bat (P118) in one of the rooms — room 3. The cricket bat was marked with the No '12' and later handed over to SP99, the investigating officer, who subsequently handed it, together with other exhibits, to the Chemistry Department for analysis.

- [210] DSP Shaikh Zainal Abidin bin Shaikh Omar ('SP34') testified that on 14 September 2010 around 5.30pm he was directed to go to Kampung Kelanang. There, he saw marine divers in the river. The divers brought up six zinc sheets. They were handed to him and he marked them as H15–H20. The zinc sheets H15–H20 (P77A, P80A, P78A, P79A, P75A, and P76A respectively) were subsequently handed over to SP99 who sent them to the Chemistry Department for analysis. A
B
- [211] SP86 was the chemist who conducted DNA analysis of the cricket bat and zinc sheets as well as various other items. C
- [212] SP86's examination of the cricket bat (P118) showed the presence of bloodstains on the cricket bat. The DNA profile obtained from the blood stains matched that of Hisham. D
- [213] SP86 found bloodstains on zinc sheets H16 and H17. The DNA profile obtained from the bloodstains on zinc sheet H16 matched those of Kamal's biological mother and children. SP86 also found that the DNA profile of the bloodstains on zinc sheet H17 matched those of Kamil's biological mother and father. E
- [214] SP99 gave evidence that on 12 September 2010, he went with his team and SP32 to Kunci Air Jalan Pasar Besar Banting. The second and fourth accused persons were with SP32. There, SP99 saw the fourth accused pointing towards the direction of the Kunci Air. SP99 instructed three divers to enter the Kunci Air. The divers retrieved two Blackberry handphones, one white and one black, from the depths of the Kunci Air. F
- [215] A white Blackberry handphone bearing IMEI No 352060042164855 (P39(B)) was identified by SP14, Kamil's wife, as belonging to Kamil. SP14 had handed over the box for the Blackberry handphone, together with, among others, its warranty card, to the police. G
- [216] A black Blackberry handphone bearing IMEI No 3565430351388048 (P28A) was identified by SP8 ('Hisham's wife') as belonging to Hisham. Its box was handed over by SP8 to the police. H
- [217] SP51, a police forensic officer testified that on 13 September 2010 around 5.05pm he and his team went to Sungai Kanchong Laut. There, a Seiko Racing Team watch (P74) was discovered. Its metal strap and glass face were broken. According to SP97, the receipt of purchase of that Seiko watch bearing serial No 1335759 as well as the box, manuals and warranty cards were received from a member of Kamal's family. I

- A [218] According to Hisham's wife, SP8, he was wearing a Longines watch when he drove her to her workplace in the morning of the day in question. SP8 identified the watch (P30) and the warranty card that she had handed over to the police earlier (P31).
- B [219] SP27 testified that on 11 September 2010 he went to Selvapandian a/l Veerappan ('SP12')'s house around 11pm. SP12 is the fourth accused's uncle. SP27 seized P30 from SP12's house. It was on a table in a bedroom in SP12's house. The serial number engraved on the back of the watch (34090536) was recorded in the search list signed by SP12 (P37) and in the police report lodged by SP27 in relation to the seizure (P112).
- C [220] SP12 admitted in evidence that he received a Longines watch from SP29. However, when P30 was shown to him in court he denied that it was the same watch given to him. He said the bracelet of the watch shown to him was different from the watch he received from SP29.
- D [221] In our view, SP8's and SP27's evidence as well as the contemporaneous documents (P37 and P112) were sufficient to show that Hisham's Longines watch had found its way through SP29 to SP12. SP12's denial of P30 being the same watch flew against the neutral evidence ie P37.
- E [222] On 14 September 2010 around 2.20pm, SP51 went to Sungai Kanchong Laut in Kampung Indah. He witnessed the discovery from the river by divers of a Bell & Rose Limited Edition watch. It too had a broken glass face. This watch was identified by SP14, Kamil's wife, as her husband's watch (P42A). The box and warranty card with a handwritten note in Kamil's handwriting on the purchase of P42A were handed over by SP14 to the police and tendered in evidence.
- F [223] Kamil's car, a black BMW with the registration No AAJ 5, was found on 6 September 2010 parked in the parking lot at Jalan SS 12/1B in Subang Jaya, across the road from the Dorsett Hotel. SP34, the head of the police forensic team, went to the scene where the car was found. He found the car to be locked. It was only unlocked half an hour later when a key was obtained from Kamil's elder brother. A copy of *The Sun* newspaper dated 30 August 2010 was found inside the car.
- G [224] Sosilawati's car, a black BMW with the registration number of WTL 11 was also found on the same night (6 September 2010). It was found parked at the parking lot of Flat Anggerik in USJ 1 in Subang Jaya. SP25 was the head of the police forensic team called to the scene where the car was found. SP25
- H
- I

found the car was not locked, and it was wet and dirty. SP25 also found several newspapers in the car, all of which were dated 30 August 2010 (the day in question).

A

[225] The key to the car WTL 11 (P47) was found by a diver on the night of 13 September 2010 in a drain at USJ 1, Persiaran Subang, Subang Jaya. The diver was part of the team led by SP32 to the scene upon information received from SP29. The key was subsequently handed over to SP99. SP99 testified that he successfully started the car using the key.

B

[226] Hisham's car, a black Proton Perdana bearing registration No JDN 1148, was seen by SP15 on the night of the day in question still parked at the location given by Hisham to SP15 in their telephone conversation earlier on that day. She went to the same location on 31 August 2010 and found the car still there. SP8 and a relative went to retrieve the car sometime in the middle of September 2010 from the same location.

C

D

Finding

[227] The irresistible inference that may be drawn from the huge fire seen by SP33 around midnight of the day in question, which scalded the oil palm fronds nearby as testified by SP48, was that someone went to great trouble to hide traces of any evidence of what had occurred on the night of the day in question and the fate that had befallen Sosilawati and the three others.

E

F

[228] The DNA from the bloodstains on the zinc sheets retrieved from the river and on the cricket bat found at the farm showed that Kamil, Hisham and Kamal had been inflicted with injuries. The screams heard by SP33 lend weight to this irresistible inference.

G

[229] The manner of the disposal of the zinc sheets, Kamal, Kamil and Hisham's watches, and Kamil and Hisham's telephones show that there was an attempt to obliterate any trace of the incident.

H

[230] There was further evidence of that attempt to sidetrack the police by parking Sosilawati's car at USJ 1 and Kamil's cars at SS 12. The key to Sosilawati's car was recovered from the drain.

COMMON INTENTION

I

Were Sosilawati and the three others murdered by the accused persons acting with common intention?

A [231] The accused persons were charged under s 302 read together with s 34 of the Penal Code.

B [232] This court in *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617 dealt with s 34 of the Penal Code at p 649 as follows:

C [98] Section 34 of the Penal Code provides that when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act was done by him alone. The Supreme Court in (1) *Namasiyam* (2) *Rajindran* (3) *Goh Chin Peng*, and (4) *Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 at p 344 observed that:

D In law, common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proved either by direct or by circumstantial evidence that there was (a) a common intention to commit the very offence of which the accused persons are sought to be convicted and (b) participation in the commission of the intended offence in furtherance of that common intention.

E Where the prosecution case rests on circumstantial evidence, the circumstances which are proved must be such as necessarily lead only to that inference. Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused (*The Supreme Court (of India) on Criminal Law 1950–1960* by JK Soonavala at pp 188–193).

F [99] It is trite that when s 34 of the Penal Code is alluded to in a charge for murder, there is no requirement to prove who actually or ultimately caused the death of the deceased (*Ong Chee Hoe & Anor v Public Prosecutor* [1999] 4 SLR 688). In that case the court opined:

G In any case, the effect of invoking s 34 made it unnecessary to determine who exactly the actual doer of the offence in question was. In the Privy Council decision of *Barendra Kumar Ghosh v Emperor* AIR 1925 PC 1, the court stated:

H Section 34 deals with the doing of separate acts, similar or diverse, by several persons; but if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself.

I [233] The following evidence shows that the first accused knew that Sosilawati and Kamil were coming to Banting on the day in question.

[234] Kamil had called the first accused at telephone No 0122051243 on 23 August 2010 and shortly after that he called Sosilawati. The same thing

happened on 24 August 2010. The call to the first accused's number was made after Kamil received a missed call from the first accused. A

[235] The telecommunication records show that at 5:59:04pm and 6:01:25pm on the day in question Sosilawati made telephone calls to the first accused. B

[236] Evidence also shows that Sosilawati had business dealings through her company, Southern Symphony Sdn Bhd, with the first accused acting as her solicitor. In fact, Sosilawati's dealings with the first accused went beyond that of solicitor-client relationship. C

[237] Southern Symphony and the first accused's legal firm had also entered into a 'joint venture' agreement on 3 August 2010 (P161). In the 'joint venture' agreement, they would sell a piece of property purchased by Southern Symphony Sdn Bhd at an inflated price, and the gain from the sale be shared equally between them. D

[238] That agreement was the basis for the issuance of the two cheques drawn on the private bank account of the first accused (P162 and P163). This is evident by the words 'Pursuant to Agreement between Pathma Nalli & Partners and Southern Symphony Sdn Bhd' written on the reverse side of the cheques. SP60, a clerk at the first accused's legal firm (Pathma Nalli & Partners) testified that she was the one who wrote out the cheques and wrote the words on the reverse side of the cheques on the first accused's instructions. These were the two cheques according to SP15 that Sosilawati wanted to bring forward the dates of encashment, the very reason why Sosilawati and the three others went to Banting on the day in question. E F

[239] The evidence points to the second, third and fourth accused persons being employees of the first accused. This is confirmed by SP33, SP37, SP39 and SP60. The fourth accused was in charge of the farm. G

[240] SP33 gave evidence that on the day in question, before 5pm, she and the others were told by Jesyntha to stay indoors. She then prepared food for the fourth accused, who came back around 5pm. While the fourth accused was eating, he asked Jesyntha to get his shoes but Jesyntha asked SP33 to do so. The fourth accused then asked Jesyntha to get a *parang* and a knife. Jesyntha instructed SP33 to do so. SP33 took the *parang* and knife from the top of a cupboard in the fourth accused's room. He instructed her to place the *parang* and knife behind the door where there was a sofa. H I

[241] SP33 then saw the fourth accused going out of the house. That was when she saw the first accused arriving in his golden brown car. SP33 saw the

- A fourth accused place the *parang* and knife in the back seat of his own car which she described as the car without a roof ('kereta yang tak ada tutup'). After that, the first and fourth accused persons were seen by SP33 having a conversation near the dog kennels. They were then seen by SP33 leaving in a hurry in the fourth accused's car. SP33 estimated the time to be around 5.55pm.
- B
- C [242] According to SP33, Jesyntha received a telephone call after they left. Lolitha who was staying in the front house (which was identified by SP33 as the house in P4(5)) was instructed to move into the building (described by SP33 as 'asrama') where SP33 stayed with the fourth accused and his family. She did so. They remained in the 'asrama' with windows closed, all night, except when SP33 went out to place the pail outside and to retrieve the pail later that night, as mentioned earlier.
- D [243] SP33 said that around 1am when she went to retrieve the pail from the karaoke hut, she saw the fourth accused (wearing the brown and blue t-shirt she had placed in the pail earlier) at the back part of the farm where the huge raging fire was. She saw him with three of his workers but she could not see their faces.
- E [244] The next morning, 31 August 2010, SP33 said she was directed by Jesyntha to go out of the house on the fourth accused's instruction. When she came out of the house she saw the first accused was already there with the fourth accused. The first accused gave her a document in a blue folder and the fourth accused told her to give it to Jesyntha for safe keeping. SP33 did as instructed.
- F But later the fourth accused came back and asked for the document.
- G [245] From SP33's evidence it was clear that the first and fourth accused persons knew that there were people coming to the farm that evening on the day in question. It was also clear that the fourth accused, under whose charge the farm was, had played an active role in securing that the other persons living/staying at the farm were kept out of sight of what was taking place in the other buildings and at the burn site.
- H [246] The acts of the second and fourth accused persons leading SP32 to the location where the Seiko watch, the logs and the zinc sheets were found, and pointing to the location, are admissible as conduct under ss 8 and 27 of the EA. The conduct and information leading to the discovery show that the second and fourth accused persons knew of the various locations where the items had been disposed of. They would not have had such knowledge had they not participated in the acts leading to the deaths of Sosilawati and the three others.
- I

[247] All these circumstances, when taken together irresistibly lead to one and only conclusion that the first, second and fourth accused persons committed the offences as charged and that they committed the same in concert pursuant to a pre-arranged plan.

A

FINDINGS

B

[248] Our findings in summary are as follows:

- (a) there was opportunity for the first, second and fourth accused persons to commit the murder. The farm ie the scene of the crime is the property of the first accused. Before going to the farm Sosilawati had given notice to the first accused of her intention to meet up with him, which necessitated going to the farm. In short, when Sosilawati and the three others entered the farm, an opportunity was afforded to the three accused persons to successfully carry out the murders. In short there was easy passage for the three accused persons to commit the offence;
- (b) there was preparation prior to the murders, eg logs were brought into the farm with the intention of lighting them up later. This preparatory act falls squarely under s 8 of the EA;
- (c) there was ample evidence, as testified by SP33, of the logs having been burnt. She clearly saw the fire from the burning logs. The remnants of the burnt logs were later discovered after information was received;
- (d) the totality of the evidence is that the bodies of Sosilawati and the three others were completely incinerated with the use of the logs;
- (e) SP33 also saw the first accused at the farm prior to the murder;
- (f) there was evidence of discovery pursuant to s 27 of the EA;
- (g) amongst the items discovered were burnt logs, zinc sheets that were placed on the logs, watches, and Blackberry handphones owned by the deceased persons;
- (h) two of the sheets of zinc had bloodstains carrying the DNA of Kamil and Kamal;
- (i) the DNA of Hisham on the cricket bat, an item discovered in the course of the investigation, further strengthened the case against the three accused persons;
- (j) P30 was discovered from SP12 who received it from SP29, who in turn was directed by the fourth accused to give it to SP12;
- (k) there was violence in this case. Bloodstains of the deceased persons were found on the bat, two zinc sheets and wall of the farm house. Unless there was violence no blood would have been splattered on the wall;

C

D

E

F

G

H

I

- A** (l) the existence of fear was established. SP33 testified that she heard screams during the night of the day in question;
- (m) the first, second and fourth accused persons attempted to allay suspicion by covering their tracks subsequent to the murder. They did it in the following manner:
- B**
- (i) at the risk of repeating, the three accused persons burnt the bodies in order to disassociate Sosilawati and the three others with the farm, and by extension with them;
- C** (ii) physical items owned by the deceased persons were disposed of and scattered at various locations. Personal items belonging to the deceased persons like the Seiko watch, the Bell & Ross watch, and the Blackberry handphones were simply thrown away, except for Hisham's watch which was discovered from SP12. It goes against all logic for poor farm hands to dispose of these items, unless ordered by someone. Only a person who wields power over them could give such an order; and
- D**
- (iii) the three accused persons also attempted to sidetrack the police by parking Sosilawati's car in USJ 1 in Subang Jaya in the hope that the police would be thrown off the trail. With the car found somewhere else, it would have appeared that surely Sosilawati could not have gone to Banting; and
- E**
- (n) the conduct of the second and fourth accused persons, pointing to the location of the items that led to their discovery falls within the ambit of s 8 of the EA.
- F**

G [249] At the end of the prosecution case, the combined weight of the evidence leads to only one conclusion ie Sosilawati and the three others must have met their untimely ends at the farm at the time stated in the charges, at the hands of the first, second and fourth accused persons. That being so, the prosecution had successfully established a prima facie case against the three accused persons.

H [250] Alluding to the defence of the first accused as at para 34 of this judgment, it was mere denial and one of alibi. The second accused at para 38 of this judgment merely said that nothing happened at the farm on the day in question. The fourth accused in his defence merely testified that he saw Sosilawati and the three others being beaten up, but completely denied his involvement (as per paras 42–43 of this judgment). We conclude that the defence evidence failed to raise any reasonable doubt on the prosecution case.

I

DECISION

[251] From our careful examination of the evidence, the relevant portions of which we have set out at length above, it is our finding that there is overwhelming evidence before the court to show that Sosilawati and the three others were murdered at the farm within the time and on the date stated in the charges, and that their murders were committed by the first, second and fourth accused persons acting with common intention. As a corollary, we agree with the courts below that on the evidence before the courts the prosecution had succeeded in proving its case beyond reasonable doubt as against the first, second and fourth accused persons on all the four charges.

[252] However, we find that there is insufficient evidence implicating the third accused in the murder of Sosilawati and the three others as charged. The third accused was just a farm worker. The evidence connecting him to the incident are: (a) he was seen by SP33 unloading the logs at the farm a day before the day in question; and (b) he was seen by SP59 at the farm at 10pm on the day in question. However, we hold that it is unsafe to rely on the evidence of SP59 who was rightly declared hostile by the learned trial judge. Apart from that, there was no evidence of conduct under s 8 of the EA and no evidence showing that he was involved in the discovery of the items under s 27 of the EA. In view of the above, we hold that the learned trial judge had erred in calling upon the third accused to enter on his defence at the close of the case for the prosecution.

[253] In the result, we dismiss the appeals of the first, second and fourth accused persons and affirm the convictions and sentences imposed on them by the courts below. We find the convictions safe. For the reasons given above, we allow the appeal by the third accused. The conviction and sentence against the third accused are set aside. The third accused is acquitted and discharged of the offences as charged.

Matan's appeal allowed, his conviction and sentence set aside and acquitting and discharging him of the charges; the appeals of the other three appellants dismissed and their convictions and sentences affirmed.

Reported by Ashok Kumar

NANDA KUMAR KUNYIKANAN & ANOR

v.

PP

[2011] 1 MLRA 613

Court of Appeal, Putrajaya
Hasan Lah, Abdul Malik Ishak, Azhar Ma'ah JJCA
[Criminal Appeal No: J-05-18-2008]
8 June 2011

***Criminal Procedure:** Appeal — Appeal against conviction — Trafficking in dangerous drugs — Whether evidence of agent provocateur unacceptable as there was no evidence that at material time he was a detective corporal — Whether monies passed from complainant to accused should be tendered as evidence — Whether exact words used by agent provocateur must be proved before evidence of agent provocateur could be accepted by court — Whether judicial commissioner misdirected himself in holding that failure of prosecution to call relevant witnesses had no material effect on prosecution's case — Whether information received and acted upon by police was hearsay, prejudicial to appellants and inadmissible*

The appellants were jointly charged and tried in the High Court for a common intention in trafficking in dangerous drugs, to wit, 6004.3 grammes of cannabis and therefore committing an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and punishable under s 39B(2) of the DDA read together with s 34 of the Penal Code. At the conclusion of the trial, they were convicted and sentenced to death. The appellants appealed against the conviction. Both the appellants had discussed with the agent provocateur ('SP4') about the sale transaction of cannabis at the price of RM1,200 per kilogramme. Subsequently, a box was unloaded from a motor lorry. The 1st appellant opened the box in the presence of SP4 and its contents were exposed. SP4 saw inside the box compressed dried leaves suspected to be ganja. The Chief Inspector ('SP') then came out of his ambush position together with other police officers and introduced his office. Both the appellants fled. They were eventually arrested.

Held (dismissing the appellants' appeal):

(1) SP4 testified he was a police officer. At the material time, SP4 was a detective corporal. When SP4 was re-examined, he testified that in 1999, he was promoted to corporal. Thus, SP4's position as a police officer of whatever rank has been proved beyond reasonable doubt in compliance with s 40A(2) of the DDA. (paras 44 & 46)

(2) The court is not dealing with a charge of corruption where monies passed from the complainant to the accused should be tendered as evidence. Here, the cannabis seized and analysed by the government chemist had been produced and tendered as exhibits. That would be sufficient. At any rate, there was



evidence that SP7 gave the monies to SP4 and the monies were counted by the appellants and after the arrest of the appellants, SP4 returned the monies to SP7. The evidence of SP4 need no corroboration. The sterling and impeccable evidence of SP4 weighed heavily in favour of the prosecution. (paras 47 & 51)

(3) There is no requirement in s 40A of the DDA that exact words used by an agent provocateur must be proved before the evidence of the agent provocateur, could be accepted by the court. Section 40A of the DDA is a special provision to nab drug traffickers through the uncorroborated evidence of agents provocateurs. (para 54)

(4) Under s 114(g) of the Evidence Act 1950, the court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. The usage of the word “may” gives the discretion to the court whether to invoke the adverse inference to a given set of facts. It is not a mandatory inference. The failure by the prosecution to call the relevant witnesses to give evidence in court could not be categorised as “withholding or suppression of evidence” as concerted attempts to trace them were not successful. Thus, these witnesses were outside the control of the prosecution. (paras 64 & 67)

(5) The prosecution had successfully proved beyond reasonable doubt that both the appellants jointly trafficked in dangerous drugs. (para 69)

(6) The police just could not stand idle and ignore any information received about drug trafficking without taking any investigative action. Despite the fact that SP7 had acted on information received from the informer, it could not per se be construed as hearsay, prejudicial and inadmissible in one breath. There was more than ample evidence to convict both the appellants as per the charge. Further, s 40 of the DDA creates a statutory exception to the hearsay rule, and that there is no necessity for the informer to appear in court and testify. If informers are required to testify, then there will be a day when information pertaining to criminal activities stop coming and the crime rates will go up. (paras 71, 77, 84 & 93)

Case(s) referred to:

Abdul Ghani Jusoh & Anor v. PP [1980] 1 MLRA 262; [1981] 1 MLJ 25 (*refd*)

Andy Bagindah v. PP [2000] 1 MLRA 299; [2000] 3 MLJ 644; [2000] 3 CLJ 289; [2000] 3 AMR 2611 (*refd*)

Balachandran v. PP [2004] 2 MLRA 547; [2005] 2 MLJ 301; [2005] 1 CLJ 85; [2005] 1 AMR 321 (*refd*)

Chan King Yu v. PP [2008] 2 MLRA 695; [2009] 1 MLJ 457; [2009] 1 CLJ 601 (*refd*)

Chan Kwok Keung & Anor v. The Queen [1989] 1 MLRA 348; [1990] 1 CLJ 411 (*refd*)

Chow Kok Keong v. PP [1997] 2 MLRA 382; [1998] 2 MLJ 337; [1998] 2 CLJ 469; [1998] 2 AMR 1401 (*refd*)



- DA Duncan v. PP* [1980] 1 MLRA 55; [1981] 2 MLJ 195 (refd)
- Gunalan Ramachandran & Ors v. PP* [2004] 2 MLRA 180; [2004] 4 MLJ 489; [2004] 4 CLJ 551; [2004] 6 AMR 189 (refd)
- Hardy* [1794] 24 State Tr 199 (refd)
- K Saravanan S Karupiah v. PP* [2002] 1 MLRA 539; [2002] 3 MLJ 465; [2002] 4 CLJ 144; [2002] 3 AMR 3214; [2002] 3 AMR 3214 (refd)
- Khoo Hi Chiang v. PP & Another Case* [1993] 1 MLRA 701; [1994] 1 MLJ 265; [1994] 2 CLJ 151; [1994] 1 AMR 323 (refd)
- Kuruma, Son of Kaniu v. The Queen* [1955] AC 197 (refd)
- Lee Lee Chong v. PP* [1998] 2 MLRA 111; [1998] 4 MLJ 697; [1998] 4 CLJ 655; [1999] 1 AMR 925 (refd)
- Looi Kow Chai & Anor v. PP* [2002] 2 MLRA 383; [2003] 2 MLJ 65; [2003] 1 CLJ 734; [2003] 1 AMR 89 (refd)
- Mawaz Khan and Amanat Khan v. The Queen* [1967] 1 AC 454 (refd)
- Munusamy Vengadasalam v. PP* [1986] 1 MLRA 292; [1987] 1 MLJ 492; [1987] CLJ (Rep) 221 (refd)
- Namasiyiam & Ors v. PP* [1987] 1 MLRA 73; [1987] 2 MLJ 336; [1987] CLJ (Rep) 241 (refd)
- Ooi Hock Leong v. Regina* [1955] 1 MLRH 719; [1955] 21 MLJ 229 (refd)
- PP lwn. Mohd Isha Alias & Satu Lagi* [2003] 1 MLRA 66; [2003] 3 MLJ 305; [2003] 2 CLJ 142; [2003] 4 AMR 180 (refd)
- PP v. Abdul Manaf Muhamad Hassan* [2006] 1 MLRA 319; [2006] 3 MLJ 193; [2006] 2 CLJ 129; [2006] 4 AMR 477 (refd)
- PP v. Chia Leong Foo* [2000] 1 MLRH 764; [2000] 6 MLJ 705; [2000] 4 CLJ 649 (refd)
- PP v. Chong Chee Kin & Anor* [1995] 4 MLRH 851; [1995] 2 MLJ 679 (refd)
- PP v. Chong Nyuk Min & Anor* [1995] 4 MLRH 531; [1995] 3 MLJ 642 (refd)
- PP v. Dato' Seri Anwar Ibrahim (No 3)* [1999] 1 MLRH 59; [1999] 2 MLJ 1; [1999] 2 CLJ 215 (refd)
- PP v. Lam San* [1991] 1 MLRA 219; [1991] 3 MLJ 426; [1991] 1 CLJ (Rep) 391 (refd)
- PP v. Leonard* [1960] 26 MLJ 13 (refd)
- PP v. Low Soo Song* [2004] 5 MLRH 868 (refd)
- PP v. Mansor bin Md Rashid & Anor* [1996] 2 MLRA 35; [1996] 3 MLJ 560; [1997] 1 CLJ 233 (refd)
- PP v. Mohamed Halipah* [1980] 1 MLRH 1; [1982] 1 MLJ 155; [1981] CLJ (Rep) 238 (refd)
- PP v. Mohd Radzi Abu Bakar* [2005] 2 MLRA 590; [2005] 6 MLJ 393; [2006] 1 CLJ 457; [2005] 6 AMR 203 (refd)
- PP v. Neoh Wan Kee* [1984] 2 MLRH 109; [1985] 1 MLJ 368 (refd)
- PP v. Nur Hassan Salip Hashim & Anor* [1993] 1 MLRH 517; [1993] 2 CLJ 551; [1993] 4 AMR 406 (refd)



PP v. Ooi Teng Chian [2005] 2 MLRA 199; [2006] 1 MLJ 213; [2005] 4 CLJ 557; [2006] 2 AMR 136 (refd)

PP v. Padi Abdullah [1988] 2 MLRH 118; [1989] 2 MLJ 60; [1989] 2 CLJ (Rep) 361 (refd)

PP v. Reza Mohd Shah Ahmad Shah [2002] 4 MLRH 724; [2002] 4 MLJ 13 (refd)

PP v. Sa'ari Jusoh [2007] 1 MLRA 36; [2007] 2 MLJ 409; [2007] 2 CLJ 197 (refd)

R v. Timothy John Hennessey [1979] 68 Cr App R 419 (refd)

Srichand K Khetwani v. The State of Maharashtra [1967] AIR SC 450 (refd)

Subramaniam v. PP [1956] 1 WLR 965 (refd)

Tee Thian See v. PP [1996] 3 MLRH 509; [1996] 3 MLJ 209; [1997] 5 CLJ 654 (refd)

The Queen v. Benz And Another [1989] 168 CLR 110 (refd)

Vijayaratnam v. PP [1961] 1 MLRH 553; [1962] 1 MLJ 106 (refd)

Walton v. The Queen [1988-1989] 166 CLR 283 (refd)

Yeo Choon Huat v. PP [1998] 1 SLR 217 CA (refd)

Legislation referred to:

Criminal Procedure Code, ss 2, 107(1), 113, 399

Dangerous Drugs Act 1952, ss 2, 39B(1)(a), (2), 40(3), 40A

Evidence Act 1950, ss 45, 114(g)

Penal Code, s 34

Counsel:

For the 1st appellant: Subash Ramasamy; M/s Chand, Jag & Assocs

For the 2nd appellant: Gobind Singh Deo (S Prakash with him); M/s Gobind Singh Deo & Co

For the respondent: Tengku Amir Zaki Tengku Hj Abdul Rahman DPP



JUDGMENT

Abdul Malik Ishak JCA:

Introduction

[1] Both the appellants were jointly charged and tried in the High Court of Johor Bahru that they together at about 8pm. on 24 August 2002 in front of Hotel Apollo, Jalan Nakhoda 7, Taman Ungku Aminah in the district of Johor Bahru in the State of Johor Darul Takzim trafficked in dangerous drugs, to wit, 6004.3 grammes of cannabis and had therefore committed an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 (“the Act”) and punishable under s 39B(2) of the same Act read together with s 34 of the Penal Code.

[2] At the conclusion of the trial, they were convicted and sentenced to death. They filed notices of appeal and we heard them. At the end of the hearing, we dismissed their appeals and affirmed the decisions of the High Court of Johor Bahru. We now give our reasons.

The Facts

[3] On 20 August 2002, ASP Charun Aai Been (SP7) received an information from an informer, one male Chinese, that one male Indian was offering to sell 20 kilogrammes of ganja at the price of RM1,200 per kilogramme.

[4] On 21 August 2002, SP7 directed Detective Corporal Yusof Keling (SP4) to be an agent provocateur.

[5] On 22 August 2002, SP7 introduced SP4 to the informer.

[6] On 22 August 2002, SP4 met the informer outside the restaurant area at Taman Ungku Tun Aminah. At that time, the informer introduced SP4 to two male Indians. SP4 then spoke about the purchase of ganja with the two male Indians. Both the male Indians stated that one kilogramme of ganja priced at RM1,200 per kilogramme. Both the male Indians were identified by SP4 as the first appellant (“A1”) and as the second appellant (“A2”). One of the appellants stated that he would contact SP4 in two days time if the supply of ganja was obtained.

[7] On 24 August 2002, SP4 received a telephone call via hand phone from one of the appellants who asked to meet SP4 on the same day at 3pm in the vicinity of Tasik supermarket at Taman Ungku Tun Aminah. SP4 agreed and he met both the male Indians at the designated place. In the meeting, one of the male Indians stated that the supply of 20 kilogrammes of ganja was already available. Both the male Indians then asked SP4 to get ready a sum of RM22,000. And it was agreed that the ganja would be handed to SP4 in front of Hotel Apollo at Taman Ungku Tun Aminah between 7.30pm to 8pm on 24 August 2002.



[8] SP4 briefed SP7 about the latest development. SP7 then gave RM22,000 to SP4 in denominations of RM50 and RM100 and the monies were put in a waist pouch. It was agreed that if the ganja was identified, SP4 should wipe his hair with his hand as a signal for the police party to ambush the targets.

[9] On 24 August 2002 at 6.15pm, SP4 went to Hotel Apollo in a motor car accompanied by Lance Corporal Sabran (SP5). On arrival at the said hotel, the motor car was parked near to the said hotel.

[10] In the meantime, Chief Inspector Zamri Razab (SP6) together with the rest of the police party who attended the briefing given by SP7 earlier on had arrived at the vicinity of Hotel Apollo and they took up ambush positions focussing their attention on SP4 and awaiting the signal which would be given by SP4.

[11] On 24 August 2002 at 7.30pm, A2 arrived on a motorcycle and he met SP4. A2 wanted to see and count the monies in the sum of RM22,000. The counting was done in the motor car which SP4 used to go to the said hotel. After that, A1 also arrived and he too counted the monies in the sum of RM22,000 in the same motor car. Thereafter, A1 telephoned someone and about ten minutes later, a motor lorry arrived and when it stopped A1 unloaded one box (exh. P5) from the back of the motor lorry. That box was brought down by A1 and he showed it to SP4. A1 opened the box in the presence of SP4 and SP4 saw inside the box compressed dried leaves suspected to be ganja.

[12] After SP4 identified the subject matter to be ganja, he gave the pre-requisite signal and the police party swung into action and arrested A1 after a brief struggle and A2 after a short chase and seized the compressed dried leaves suspected to be ganja.

[13] The compressed dried leaves found in the box were sent to the Government Chemist, Encik Abdullah bin Mohd Yusof (SP1), for analysis. SP1 analysed and certified the compressed dried leaves to be cannabis within the meaning of s 2 of the Act, weighing a total of 6004.3 grammes. SP1 also prepared a chemist report as per exh. P12.

[14] It is germane to mention that in the Malay language, the word "cannabis" is often referred to as "ganja".

Prima facie Case

[15] At the close of the case for the prosecution, the learned Judicial Commissioner ("JC"), after subjecting the prosecution evidence to maximum evaluation (*PP v. Dato' Seri Anwar Ibrahim (No 3)* [1999] 1 MLRH 59; [1999] 2 MLJ 1; [1999] 2 CLJ 215; *Looi Kow Chai & Anor v. PP* [2002] 2 MLRA 383; [2003] 2 MLJ 65; [2003] 1 CLJ 734; [2003] 1 AMR 89, CA; and *PP v. Mohd Radzi Abu Bakar* [2005] 2 MLRA 590; [2005] 6 MLJ 393; [2006] 1 CLJ 457; [2005] 6 AMR 203, FC), categorically held that the prosecution had proved a



prima facie case against both A1 and A2 (*Balachandran v. PP* [2004] 2 MLRA 547; [2005] 2 MLJ 301; [2005] 1 CLJ 85; [2005] 1 AMR 321, FC).

[16] The learned JC also held that both A1 and A2 had common intention to traffick in the dangerous drugs, to wit, 6004.3 grammes of cannabis. Section 34 of the Penal Code gives statutory recognition to the principle that when two persons intentionally do a thing jointly, it is just the same as if they had done it individually. The learned JC recognised this simple principle of law and he applied it vigorously.

[17] The learned JC was satisfied on the strength of the evidence adduced by the prosecution that there was common intention between A1 and A2 when both of them offered to sell the drugs and both of them were also present in front of Hotel Apollo when the drugs were sent. Both A1 and A2 actively discussed with SP4 from the very beginning about the sale of the drugs.

[18] The learned JC also held that the prosecution was correct in not calling the informer to give evidence in court bearing in mind that the informer was protected by s 40 of the Act. Consequently, the identity, the name and the address of the informer cannot be revealed. SP4 testified that the role of the informer was merely to introduce SP4 to both A1 and A2 (*Munusamy Vengadasalam v. PP* [1986] 1 MLRA 292; [1987] 1 MLJ 492; [1987] CLJ (Rep) 221, SC). And the informer was not instrumental in the subsequent transactions which finally led to the arrest of both A1 and A2 on charges of trafficking in dangerous drugs. It must be emphasised that the informer disappeared from the scene after introducing SP4 to A1 and A2.

[19] On the available evidence, the learned JC held that the prosecution had successfully proven by direct evidence that both A1 and A2 trafficked the dangerous drugs. He then called upon their defence.

The Defence At The High Court

[20] Both A1 and A2 elected to give their evidence on oath.

[21] A1 testified that on 24 August 2002, he worked as a carwasher and he did part time work with a company owned by Encik Zakaria bin Mohamed Ghazali - the father of Shaiful Asril bin Zakaria (SP9). In the said company, A1 was a general worker: pitching tents, delivering goods meant for marriage ceremony, delivering cutleries and utilities, etc.

[22] On 24 August 2002, Encik Zakaria bin Mohamed Ghazali directed A1 to deliver goods meant for marriage ceremony at Hotel Apollo that was ordered by clients. So A1 proceeded by motorcycle from the petrol station at Ulu Tiram where he worked as a car washer to go to Hotel Apollo. The time was about 6.30pm to 6.45pm. But on the way to Hotel Apollo, the motorcycle which A1 rode gave trouble at Tampoi. For this reason, according to A1, he telephoned his friend, namely A2.



[23] A2 arrived at Tampoi at about 6.30pm. A1 then rode pillion on A2's motorcycle and they both proceeded to Hotel Apollo and they arrived at the said Hotel at about 7pm. Soon thereafter, the motor lorry belonging to Encik Zakaria bin Mohamed Ghazali arrived at the said hotel. Inside the motor lorry were three persons known to A1, namely, SP9, Hairil and Kamarulzaman.

[24] According to A1, the motor lorry stopped at Hotel Apollo for about ten minutes and its engine was left running. According to A1, Kamarulzaman alighted from the motor lorry and spoke to some customers whom A1 did not know. Thereafter A1 was directed by Kamarulzaman to unload boxes from the back of the motor lorry. There were two to three boxes. According to A1, Kamarulzaman had opened the door to the back portion of the said motor lorry. After A1 had unloaded only one box, Kamarulzaman then closed the back door of the said motor lorry. And Kamarulzaman re-entered the said motor lorry from its front part. According to A1, he did not open the boxes because he was not given the responsibility to open the boxes. That being the case, A1 did not know the contents of the boxes. A1 testified that he did not attempt to run away when the police ambushed him.

[25] Under cross-examination, A1 denied the following set of facts:

(a) that A1 went to a restaurant at Taman Ungku Tun Aminah, Skudai on 22 August 2002 to meet SP4 and the informer accompanied by A2;

(b) that A1 offered to sell the ganja to SP4 at the price of RM1,200 per kilogramme;

(c) that A1 telephoned SP4 on 24 August 2002 at 11am for the purpose of meeting SP4 in the vicinity of Tasik supermarket at Taman Ungku Tun Aminah on the same day at 2pm;

(d) that A1 met SP4 at the same spot as per (c) above at 2pm and, once again, offered to sell the drugs and requested SP4 to get ready a sum of RM22,000 and A1 would hand over the drugs at Hotel Apollo at 7.30pm to 8.30pm of the same day;

(e) that A1 went to Hotel Apollo alone after he was contacted via telephone by A2;

(f) that A1 entered SP4's motor car at Hotel Apollo and counted monies amounting to RM22,000 inside the motor car; and

(g) that A1 telephoned someone and soon thereafter the motor lorry arrived at Hotel Apollo.

[26] However, A1 admitted that he unloaded one box (exh. P5) from the back of the motor lorry. But A1 denied that he opened the box (exh. P5) to see its contents, and, consequently, A1 did not know the contents of the said box.



[27] A1 disagreed that when the police ambushed, he tried to run away. A1 also disagreed that there was a scuffle between him and the police. A1 also disagreed that he tried to run away because he knew the contents of the said box.

[28] Even though A1 knew that there was no hall in Hotel Apollo to hold a wedding reception, yet A1 testified that he only obeyed the directions of Encik Zakaria bin Mohamed Ghazali and carried out his duties.

[29] There was no re-examination of A1.

[30] In his defence, A2 testified along the same lines as A1.

[31] According to A2, on the date of the incident he was working as a welder at Pasir Gudang. At 6pm, A2 received a telephone call from A1 stating that A1's motorcycle was spoilt and asking A2 to go to the Esso petrol station at Tampoi. A2 obliged and he went to the petrol station at 6.45pm and met A1. Thereafter they both went to Hotel Apollo.

[32] Upon arrival at Hotel Apollo, A2 stopped his motorcycle and A1 alighted from it. About 10 to 20 minutes later, a motor lorry arrived at the said Hotel. One person got down from the motor lorry. A1 approached the motor lorry and spoke to that individual. A2 kept his distance.

[33] A2 saw A1 unloaded one box from behind the motor lorry and put on the tarred road. But, according to A2, A1 did not open the box. The police then came and assaulted A2. The police then arrested A2 and brought him and A1 to the police station.

[34] Just like A1, A2 also denied that he met, discussed and made an offer to sell the drugs to SP4 on 22 August 2002 and on 24 August 2002. A2 also denied that he entered SP4's motor car in order to count RM22,000 and thereafter contacted A1 at Hotel Apollo on 24 August 2002.

[35] A2 testified that before 24 August 2002 he did not meet SP4 nor the informer at the restaurant at Taman Ungku Tun Aminah.

[36] Under cross-examination, A2 denied the following set of events:

(a) that on 22 August 2002, A2 went to a restaurant at Taman Ungku Tun Aminah to meet SP4 and the informer accompanied by A1 and there A2 offered to sell the ganja at RM1,200 per kilogramme;

(b) that on 24 August 2002 at 3pm, A2 and A1 met SP4 at the Tasik supermarket at Taman Ungku Tun Aminah and there A2 offered 20 kilogrammes of ganja to SP4;

(c) that A2 together with A1 promised to deliver ganja in front of Hotel Apollo on 24 August 2002 at 6.30pm to 7.30pm;



- (d) that on 24 August 2002, A2 met SP4 in front of Hotel Apollo;
- (e) that A2 entered the motor car to count the monies and after that A2 contacted A1 and the latter then came to Hotel Apollo;
- (f) that A1 entered the motor car to count the monies and after that A1 contacted someone using A2's handphone and the motor lorry then came;
- (g) that A2 was near to A1 when the motor lorry arrived at Hotel Apollo;
- (h) that when the motor lorry arrived at Hotel Apollo no one alighted from the said motor lorry;
- (i) that after the box was unloaded from the motor lorry A1 opened the said box and at that time A2 was next to A1;
- (j) that when the box was opened, A2 saw its contents; and
- (k) that A2 tried to flee when the police ambushed.

[37] However, A2 admitted that A1 was the one who unloaded one box from the back of the motor lorry. But A2 disagreed that he was near to the motor lorry when A1 brought down the box.

[38] There was no re-examination of A2.

[39] The learned JC, after reviewing the evidence of the prosecution as well as the defence, held that the appellants (A1 and A2) had not raised any reasonable doubt in the prosecution's case and found them guilty of the charge. Accordingly, the learned JC convicted and sentenced them to death.

Analysis

[40] In the face of the evidence led by the prosecution, the defence was one of mere denial. Both the appellants denied that they met, discussed and offered to sell the drugs to SP4 at RM1,200 per kilogramme.

[41] As reflected in the cross-examinations of A1 & A2, their denials were quite extensive challenging the evidence of the prosecution witnesses.

[42] A mere denial is no defence. A mere denial is insufficient to raise a reasonable doubt. A defence of this nature is not a good defence. Such a defence, if adopted, is detrimental to the accused. It will bring the accused straight to the hangman (*DA Duncan v. PP* [1980] 1 MLRA 55; [1981] 2 MLJ 195, FC; *PP v. Nur Hassan Salip Hashim & Anor* [1993] 1 MLRH 517; [1993] 2 CLJ 551; [1993] 4 AMR 406; *PP v. Reza Mohd Shah Ahmad Shah* [2002] 4 MLRH 724; [2002] 4 MLJ 13; *Andy Bagindah v. PP* [2000] 1 MLRA 299; [2000] 3 MLJ 644; [2000] 3 CLJ 289; [2000] 3 AMR 2611, CA; *PP v. Low Soo Song*



[2004] 5 MLRH 868; and *PP v. Abdul Manaf Muhamad Hassan* [2006] 1 MLRA 319; [2006] 3 MLJ 193; [2006] 2 CLJ 129; [2006] 4 AMR 477, FC).

[43] An argument was advanced by learned counsel that the evidence of SP4 as an agent provocateur should not be accepted because there was no evidence that at the material time SP4 was a detective corporal. In *Abdul Ghani Jusoh & Anor v. PP* [1980] 1 MLRA 262; [1981] 1 MLJ 25, the Federal Court held that the statement recorded by the Probationary Inspector was not a statement recorded in accordance with s 113 of the Criminal Procedure Code ("CPC") and was therefore inadmissible. Here, as an agent provocateur, the evidence of SP4 was caught by s 40A of the Act. That section is worded in this way:

Evidence of agent provocateur admissible

40A (1) Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under this Act if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.

(2) Notwithstanding any rule of law or this Act or any other written law to the contrary, and that the agent provocateur is a police officer whatever his rank or any officer of customs, any statement, whether oral or in writing made to an agent provocateur by any person who subsequently is charged with an offence under this Act shall be admissible as evidence at his trial.

[44] On 17 April 2007 when SP4 first took the witness box and testified he was and is a police officer. On that date, SP4 was a detective corporal (see p. 22 of the appeal record). When SP4 was re-examined as reflected at p. 33 of the appeal record, he testified that in 1999, he was promoted to corporal. At that time, he said he was only a corporal. The notes of evidence read as follows:

Pada tahun 1999, saya telah dinaikkan pangkat ke Kpl. Pada masa itu saya sebenarnya ialah Kpl.

[45] When SP4 gave his evidence on 19 April 2007, he testified at p. 51 of the appeal record that on 21 August 2002, he called D/Kpl Yusof bin Keling (SP4) to meet him and he directed SP4 to act as an undercover, disguised as a buyer for the supply of ganja. And on 22 August 2002 SP7 introduced SP4 - D/Kpl Yusof, to the informer. The notes of evidence read as follows:

Pada 21.8.2002, saya telah memanggil D/Kpl Yusof bin Keling (SP4) untuk berjumpa dengan saya dan saya arahkan beliau untuk bertindak sebagai 'undercover', iaitu menyamar sebagai pembeli bekalan ganja tersebut.



Pada 22.8.2002, saya telah memperkenalkan D/Kpl Yusof dengan sumber berkenaan.

[46] Thus, SP4's position as a police officer of whatever rank has been proved beyond reasonable doubt in compliance with s 40A(2) of the Act.

[47] Next, it was argued that the prosecution failed to produce the monies in the sum of RM22,000. We ask ourselves, was it necessary to produce and tender the monies? We answer this question in the negative. We are not dealing with a charge of corruption where monies passed from the complainant to the accused should be tendered as evidence. Here, both A1 and A2 were jointly charged for trafficking in cannabis, to wit, 6004.3 grammes read with s 34 of the Penal Code. The cannabis seized and analysed by the Government Chemist had been produced and tendered as exhibits. That would be sufficient. At any rate, there was evidence that SP7 gave the monies to SP4 and the monies were counted by A1 and A2 and after the arrest of both A1 and A2, SP4 returned the monies to SP7.

[48] But it was argued by learned counsel that there was no record to show that RM22,000 was in fact given by SP7 to SP4 and eventually the monies were used in the sale and purchase of the drugs involving both the appellants. That being the case, the evidence of SP4 that A1 and A2 counted the monies in the motor car should not be accepted by the court.

[49] However, the weight of the evidence showed that SP7 arranged with the head of the narcotics unit, namely, ACP Isnin for the monies to be released to SP4. The monies were put inside an envelope and then placed in a waist pouch. SP7 testified that he counted the monies before giving it to SP4. Imagine what would happen to the whole operation, if SP4 was not able to show the monies to A1 and A2 when they demanded to see and count the monies? According to SP4, he returned the monies to SP7 after both the appellants were arrested. This was also confirmed by SP7.

[50] In our judgment, the absence of any record in regard to the handing over of RM22,000 from ACP Isnin to SP7 and from SP7 to SP4 and from SP4 to SP7 after the successful operation, cannot affect the prosecution's case.

[51] It is our judgment that the evidence of SP4 need no corroboration at all (*PP v. Mohamed Halipah* [1980] 1 MLRH 1; [1982] 1 MLJ 155; [1981] CLJ (Rep) 238; *PP v. Padi Abdullah* [1988] 2 MLRH 118; [1989] 2 MLJ 60; [1989] 2 CLJ (Rep) 361; *PP v. Neoh Wan Kee* [1984] 2 MLRH 109; [1985] 1 MLJ 368; *Namasiyam & Ors v. PP* [1987] 1 MLRA 73; [1987] 2 MLJ 336; [1987] CLJ (Rep) 241, SC; and *Tee Thian See v. PP* [1996] 3 MLRH 509; [1996] 3 MLJ 209; [1997] 5 CLJ 654). The sterling and impeccable evidence of SP4 weighed heavily in favour of the prosecution.

[52] It is our judgment that the sale transaction of the drugs was complete when the sale price was determined and when both A1 and A2 had counted



the monies and eventually the drugs were sent to SP4 at Hotel Apollo as promised. The sale was complete even though the money had not been paid (*PP v. Sa'ari Jusoh* [2007] 1 MLRA 36; [2007] 2 MLJ 409; [2007] 2 CLJ 197, FC) and “selling” is one of the acts of trafficking as set out in s 2 of the Act and it is dependent on the facts of each particular case (*Chow Kok Keong v. PP* [1997] 2 MLRA 382; [1998] 2 MLJ 337; [1998] 2 CLJ 469; [1998] 2 AMR 1401, FC).

[53] It is wrong to submit as was submitted by learned counsel that the evidence of SP4 was inadmissible. Whatever evidence SP4 gave must be held to be credible and admissible because as an agent provocateur no corroboration was required. And whatever statements made by witnesses to SP4 and repeated by SP4 in his capacity as an agent provocateur in open court must be held to be admissible (*Namasiyam & Ors v. PP* (*supra*)). It is pointless for Parliament to enact s 40A of the Act if the court refuses to give effect to it. Parliament cannot act in vain and this court must give effect to s 40A of the Act and apply it vigorously to SP4 in favour of the prosecution.

[54] Going on an uphill task, it was argued by learned counsel that the exact words used by SP4 must be proved before the evidence of SP4, as an agent provocateur, can be accepted by the court. This is not the law. There is no such requirement in s 40A of the Act. It must be emphasised that s 40A of the Act is a special provision to nab drug traffickers through the uncorroborated evidence of agents provocateurs.

[55] Next, it was argued that the learned JC failed to assess the credibility of SP4 on a maximum evaluation basis by comparing it particularly with the version of the prosecution as seen in exh. P17. Now, exh. P17 is the police report of SP6 that was lodged on 25 August 2002 at 4.20am vide Scudai report 8696/2002. It was worded as follows:

Pada 24/8/2002 jam lebih kurang 2000 hrs, semasa saya bersama-sama anggota dari Jabatan Narkotik IPK Johor membuat serang hendap di Jalan Nakhoda 7, Taman Ungku Tun Aminah, Skudai, berhadapan Hotel Apollo, datang sebuah m/lori No. Pendaftaran JDY 5101 dan sebuah motosikal No. Pendaftaran JGL 1065 yang dinaiki 2 lelaki. Saya nampak salah seorang lelaki tersebut mengeluarkan satu kotak dari atas lori bahagian belakang. Saya menghampiri dan memperkenalkan diri sebagai pegawai polis kepada mereka, tiba-tiba kedua lelaki India tersebut melarikan diri, sementara pemandu lori terus memecut lori dan melanggar kenderaan pasukan yang cuba menghalangnya dan berjaya melarikan diri. Saya dapat menangkap lelaki India yang mengangkat kotak tadi dikenali dengan nama Nanda Kumar a/l Kunyikanan. K/P: 770122-01-5747, Alamat: No 12, Jln Johar 7, Tmn Desa Cemerlang, 83000 Ulu Tiram. Seorang lagi lelaki India dapat ditahan l/kurang 50 meter dari tempat kejadian dikenali dengan nama Poobalan a/l Mariapan. K/P: 770118-01-7053, Alt: No 20, Jln Perwira Tmn Timor, 81000 Kulai. Saya kemudian membuat



pemeriksaan ke atas kotak tersebut mendapat ia berisi 2 ketulan bahan tumbuhan mampat berbalut plastik lutsinar yang disyaki ganja dan 4 ketulan bahan tumbuhan mampat berbalut kertas timah dan plastik lutsinar yang disyaki ganja. Turut ditahan M/sikal No. Pendaftaran WCA 8941. Saya tahan kedua lelaki India itu untuk siasatan lanjut.

Sekian, laporan saya.

[56] In his examination-in-chief, SP4 testified as follows (see pp. 24 to 26 of the appeal record):

Perjalanan daripada Johor Bahru ke Taman Ungku Tun Aminah memakan masa lebih kurang setengah jam. Selepas kami sampai, kami pun meletakkan kereta berhampiran Hotel Apollo.

Pada jam 7.30 petang, telah datang seorang lelaki India dengan menaiki sebuah motosikal untuk berjumpa dengan saya. Lelaki India itu mahu melihat wang sebanyak RM22,000.00 untuk dikira. Pengiraan wang dibuat dalam kereta yang saya naiki. Pada masa itu L/Kpl Sabran berada di luar kereta. Setelah pengiraan wang dibuat, dan beliau mendapatinya cukup, dia telah menghubungi seseorang. Selepas itu seorang lelaki India telah datang dan mengira sekali lagi wang tersebut di dalam kereta yang saya naiki.

Lelaki India yang membuat kiraan pada kali pertama ialah OKT2. Lelaki India yang datang kemudian dan membuat kiraan kali kedua ialah OKT1.

Selepas kiraan kali kedua dan didapati wang tersebut cukup, saya bersama OKT1 telah keluar dari kereta tersebut dan OKT1 telah berhubung melalui hand phone kepada seseorang. Lebih kurang 10 minit kemudian, telah datang sebuah lori dan diletakkan bersebelahan dengan kereta yang saya naiki. Setelah lori itu berhenti, OKT1 telah mengambil satu kotak di bahagian belakang lori. Kotak itu diturunkan dan ditunjukkan kepada saya. Apabila OKT1 membuka kotak itu, saya nampak bahan daun-daun kering yang disyaki ganja dan disalut dengan plastik lutsinar. Setelah saya dapati ianya ganja, saya pun terus membuat isyarat tangan dengan menyapu tangan ke rambut. Pada masa itu beberapa orang anggota serbuan telah menyerbu dan cuba menangkap kedua-dua lelaki India itu. Selepas itu saya terus beredar dari tempat itu.

[57] SP6 testified in his examination-in-chief in this way (see pp. 40 to 42 of the appeal record):

Selepas taklimat, pada jam lebih kurang 6.00 petang, saya bersama anggota kumpulan berlepas ke tempat sasaran dengan menaiki kenderaan polis. Sesampai di sana lebih kurang jam 6.30 petang, saya arahkan anggota-anggota berligar-ligar dan memberi pemerhatian



kepada Kpl Yusof (SP4) yang bertindak sebagai Penyamar Sulit untuk melihat isyarat yang akan diberikan apabila beliau melihat dadah jenis ganja. Pada masa itu saya bersama L/Kpl Samsudin berada dalam kereta Kancil di jalan Hotel Apollo.

Pada jam lebih kurang 8.00 malam, saya nampak sebuah lori satu tan datang ke situ mengikut jalan yang bertentangan. Di situ ialah jalan sehalu tetapi lori datang secara bertentangan. Lori itu berhenti di hadapan Hotel Apollo. Pada masa yang sama, SP4 bersama 2 orang lelaki India sedang berbual-bual. Saya nampak salah seorang daripada lelaki India itu mengambil satu kotak daripada bahagian belakang lori dan meletakkannya di tepi jalan. Tidak lama kemudian, saya nampak SP4 memberi isyarat dengan menyapu tangan ke kepala. Pada masa itu, saya bersama anggota terus pergi menyerbu. Saya bersama anggota bernama Payaman telah menangkap Nanda Kumar. Dia ada di mahkamah pada hari ini.

Mahkamah: Saksi menunjuk kepada OKT1. OKT1 dicamkan.

Seorang lelaki India lagi telah melarikan diri dan dikejar oleh anggota saya. Lelaki itu kemudiannya dikenali sebagai Poobalan.

Mahkamah: Saksi menunjuk kepada OKT2. OKT2 dicamkan.

Semasa OKT1 ditangkap, dia berada di hadapan Hotel Apollo. Semasa hendak menangkap OKT1, ada berlaku sedikit pergelutan.

Semasa hampir dengan OKT1, saya menjerit perkataan 'polis' sambil menunjukkan kad kuasa polis kepada lelaki berkenaan.

Jarak antara kereta yang saya berada dan SP4 pada masa itu ialah lebih kurang 10 meter.

Saya boleh cam SP4.

Mahkamah: Kpl Mohd Yusof Keling dicamkan.

Semasa tangkapan dibuat, saya rampas sebuah kotak yang mengandungi 6 ketulan bahan mampat yang disyaki dadah jenis ganja. Dua daripada ketulan tersebut tidak berbalut kertas timah.

Mahkamah: Eks. ID5 ditunjuk kepada saksi.

Eks. ID5 ialah kotak yang dirampas. Pada kotak itu saya ada turunkan tandatangan saya dan mencatat tarikh 24.8.2002.

Mahkamah: Eks. ID5 dikemuka dan ditanda sebagai Eks. P5.

Eks. ID6-ID11 ditunjuk kepada saksi dan dicamkan. Dikemukakan dan ditanda sebagai Eks. P6, P7, P8, P9, P10 dan P11.



Selepas tangkapan, rampasan dan pemeriksaan, saya bawa OKT dan barang kes ke pejabat untuk buat laporan polis. Sebelum buat laporan polis, saya buat 'search list' di hadapan kedua-dua OKT mengenai barang-barang yang saya rampas.

Mahkamah: Skudai Report 8696/2002 ditunjuk kepada saksi. Dikemuka dan ditanda sebagai Eks. P17.

Inilah laporan polis yang saya buat.

[58] Now, the testimony of SP4 when compared with the evidence of SP6 tallied. Even the police report of SP6 tallied with the testimonies of SP4 and SP6. The available evidence, at the scene of the crime, depicted both A2 and A1 counting the monies in SP4's motor car. And thereafter A1 contacted someone over the telephone. Meanwhile, the police personnel took up positions in the vicinity of Hotel Apollo waiting anxiously for SP4 to give the requisite signal. A motor lorry arrived and both SP4 and SP6 saw A1 removing a box from the back of the motor lorry. A1 opened the box in the presence of SP4. Compressed dried leaves suspected to be ganja were seen in the box. SP6, also saw what was happening and he introduced himself as a police officer to A1 and A2. Both the appellants took flight. They ran helter-skelter. SP6 managed to arrest A1. While A2 was also arrested approximately 50 metres away. The driver of the motor lorry managed to escape after he drove the motor lorry at a fast speed and crashed against a police vehicle that tried to prevent his escape. It was drama in real life. The sum total of it all was this. That the learned JC rightly convicted both the appellants for trafficking in dangerous drugs, to wit, 6004.3 grammes and sentenced them to death.

[59] The flight of an accused after an offence has been committed may amount to an admission by the accused of his guilt and that would be an admissible evidence. Each case must be dependent on its own peculiar facts. Here, after the box was unloaded by A1 and A1 opened the box in the presence of SP4 and its contents exposed, SP6 introduced his office and both the appellants fled. In the circumstances of this case, it is safe to connect both the appellants with the offence (*PP v. Chia Leong Foo* [2000] 1 MLRH 764; [2000] 6 MLJ 705; [2000] 4 CLJ 649 which quoted the speech of Lord Ackner in *Chan Kwok Keung & Anor v. The Queen* [1989] 1 MLRA 348; [1990] 1 CLJ 411, CA, at p. 413) bearing in mind that, on 22 August 2002, both the appellants discussed with SP4 about the sale transaction of ganja at the price of RM1,200 per kilogramme. This was an outright case of trafficking.

[60] Next, it was argued that the learned JC seriously misdirected himself when he held that the failure on the part of the prosecution to call witnesses, namely, Hairil and Kamarulzaman, had no material effect on the case for the prosecution. It was further argued that the learned JC failed to recognise that the evidence of these two individuals would have been significant to the defence, in particular the defence of A2 who said that he had no knowledge of



the contents of the box wherein the drugs were found. In our judgment, these arguments are without merit. We must allude to the evidence of SP9.

[61] In his testimony, SP9 stated that on the date of the incident - 24 August 2002, the motor lorry bearing registration number JDY 5101 that was used to send the cannabis to Hotel Apollo was driven by someone named Hairil. Together with SP9 in the said motor lorry was another male Malay by the name of Kamarulzaman. When the said motor lorry arrived at Hotel Apollo, SP9 saw Kamarulzaman alighted from the said motor lorry and spoke to A1. Thereafter, SP9 saw Kamarulzaman re-entered the said motor lorry. And as soon as the box (exh. P5) which contained cannabis was unloaded by A1 from the said motor lorry, the police party launched an ambush. At that juncture, according to SP9, Kamarulzaman directed Hairil to escape with the said motor lorry. And all three of them - SP9, Kamarulzaman and Hairil, managed to escape.

[62] There was evidence to show that SP9 took his wife and child and sought refuge in a chalet in Mersing. Hairil and Kamarulzaman also fled. SP9 testified that his late father by the name of Encik Zakaria bin Mohamed Ghazali who was the owner of the motor lorry JDY 5101 was remanded by the police. On 25 August 2002 at about 8.30pm, SP9 arrested SP9 at the Mobil petrol pump station, Jalan Tebrau, Kampung Melayu Pandan, Johor Bahru.

[63] It was argued by learned counsel that the failure on the part of the police to trace Hairil and Kamarulzaman for them to come to court to testify had greatly affected the prosecution's case for the following reasons:

- (a) that both Hairil and Kamarulzaman were material witnesses who could give evidence pertaining to what had transpired at Hotel Apollo when the motor lorry arrived there and soon thereafter they escaped from the scene;
- (b) that there was every possibility that the cannabis belonged to Hairil and Kamarulzaman and that both the appellants were their victims; and
- (c) that the police failed to conscientiously track and arrest Hairil and Kamarulzaman and, consequently, s 114(g) of the Evidence Act 1950 should be invoked

[64] Under s 114(g) of the Evidence Act 1950 the court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. The usage of the word "may" gives the discretion to the court whether or not to invoke the adverse inference to a given set of facts. It is not a mandatory inference.

[65] Since time immemorial, the courts are reluctant to draw an adverse inference against the prosecution. The courts must be satisfied that:



- (a) the witness that was not offered was a material witness;
- (b) the prosecution purportedly withhold evidence which it possessed and which was always available; and
- (c) what the prosecution did was done with an ulterior motive to frustrate the defence.

[66] With these basic guidelines, we will now examine the case before us. We note that the prosecution was not in a position to arrest and bring Hairil and Kamarulzaman to court notwithstanding that concerted attempts were made by the police to trace them. According to SP6, at the time of the offence at Hotel Apollo, the three of them - referring to SP9, Hairil and Kamarulzaman managed to escape when the motor lorry they were in collided against two police vehicles which were used to thwart their escape. Only SP9 who was in the motor lorry was arrested at the petrol station at Jalan Tebrau, Kampung Melayu Pandan, Johor Bahru. It was SP9 who showed to SP6 the location where the motor lorry was kept and SP6 eventually seized the said motor lorry. According to SP6, Encik Zakaria bin Mohamed Ghazali - the father of SP9 and the owner of the said motor lorry was also arrested. While Hairil and Kamarulzaman could not be traced and therefore could not be arrested. According to the investigating officer by the name of Chief Inspector Ihsan bin Abdullah (SP8), concerted attempts were made to trace Hairil and Kamarulzaman by SP6 continuously but to no avail.

[67] It is our judgment that the failure by the prosecution to call Hairil and Kamarulzaman to give evidence in court cannot be categorised as “withholding or suppression of evidence” but rather concerted attempts to trace them were not successful. It follows that these two witnesses were outside the control of the prosecution. Consequently, s 114(g) of the Evidence Act 1950 should not be invoked (*Munusamy v. PP (supra)*; *Yeo Choon Huat v. PP* [1998] 1 SLR 217, CA; and *Srichand K Khetwani v. The State of Maharashtra* [1967] AIR450).

[68] The evidence of SP4 as an agent provocateur showed the culpability of both the appellants as drug traffickers. From the discussions in regard to the sale of the ganja to the delivery of the ganja to SP4 at Hotel Apollo - all pointed to the involvement of both the appellants. At Hotel Apollo, the testimonies of SP4, SP5, SP6 and SP9 further showed the depth of the culpability of both the appellants.

[69] On common intention, we are satisfied that the prosecution had successfully proved beyond reasonable doubt that both the appellants jointly trafficked in dangerous drugs. The available evidence can be itemised in this fashion:

- (a) that both the appellants attended the meeting with SP4 and the informer on 22 August 2002;



(b) at the meeting on 24 August 2002 in front of the Tasik supermarket at Taman Ungku Tun Aminah both the appellants asked SP4 to get ready RM22,000;

(c) in front of Hotel Apollo, A2 entered the motor car which SP4 took to go to Hotel Apollo and counted the monies; after this, A1 took his turn and he too counted the monies in the said motor car;

(d) when A1 brought down the box (exh. P5) from the back of the motor lorry, A2 was near to SP4 at the scene of the crime; and

(e) according to SP5 when SP4 was examining the box (exh. P5), A2 who was near the motor car was observing what A1 and SP4 were doing.

[70] In regard to the failure of calling Encik Zakaria bin Mohamed Ghazali, we say that there was no necessity to call him. He passed away on 16 January 2003 (see p. 201 of the appeal record). The prosecution closed its case on 9 May 2007 (see p. 78 of the appeal record). The defence was only called on 28 July 2007 (see p. 97 of the appeal record). And A1 gave evidence on oath on 24 October 2007 (see p. 99 of the appeal record). Likewise, A2 also gave his evidence on oath on 24 October 2007 (see p. 104 of the appeal record).

[71] In regard to the complaint that SP7 acted on information received which was said to be hearsay, prejudicial to both the appellants and inadmissible citing *Chan King Yu v. PP* [2008] 2 MLRA 695; [2009] 1 MLJ 457; [2009] 1 CLJ 601 FC, with respect we have this to say. The police just cannot stand idle and ignore any information received about drug trafficking without taking any investigative action. There will be public outcry if the police were to adopt a nonchalant attitude and let such information be discarded and allow drug traffickers' leeway in trafficking the drugs without any intervention by the police. If that were to happen, Malaysia will become a haven for drug traffickers. Is it the law that only when a policeman in uniform sees an individual selling a dangerous drug to a buyer, then the policeman in uniform will act accordingly? No criminal would want to commit an offence before a policeman in uniform. That would be sheer stupidity.

[72] We have s 40A of the Act. And Yusof Abdul Rashid J in *PP v. Mohamed Halipah* (*supra*) aptly said at pp. 156 to 157:

Generally, the court is always wary in accepting the evidence of an agent provocateur but in this case the Legislature under section 40A of the Dangerous Drugs Ordinance, 1952 had dictated that the evidence of any agent provocateur shall be admissible and treated as any other evidence from any ordinary witness. The said section 40A provides:

40A. Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, no agent provocateur shall be presumed to be unworthy of credit by reason only of his having



attempted to abet or abetted the commission of an offence by any person under section 39B or regulations made thereunder if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.

It is indeed difficult to secure evidence in the normal way where an offence under section 39B of the Ordinance is concerned and the act of the police in resorting to this method of using an agent provocateur, though undesirable, is necessary in circumstances where drug trafficking has become a national issue, which may lead to national crisis. By virtue of section 40A of the Ordinance, the evidence of an agent provocateur need no corroboration to found a finding by a court,....

[73] When SP4, the agent provocateur, met both the appellants they mentioned that one kilogramme of ganja priced at RM1,200. It tallied with the information which SP7 received from the informer. Bearing in mind that the evidence of SP4 need no corroboration, this court must accept the evidence of SP4 as credible and admissible.

[74] There are provisions in the CPC pertaining to the reception of information relating to the commission of an offence. They are housed in Part V, Chapter XIII of the CPC. And they carried the caption "Information To Police And Their Powers To Investigate". Section 107 of the CPC reads as follows:

Information of offences

107.(1) Every information relating to the commission of an offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction and be read over to the informant.

(2) Every such information shall be entered in a book to be kept by that officer, who shall append to such entry the date and hour on which that information was given, and whether given in writing or reduced to writing as aforesaid shall be signed by the person giving it.

(3)(a) Notwithstanding subsection (1), information given by a person relating to the commission of an offence to a police officer, who at the time of receiving the information is not in a police station, shall be deemed to be received at a police station.

(b) A police officer receiving such information under paragraph (a) where practicable shall record or cause to be recorded the name and address of the informant, the date and time of the receipt of such information, and shall convey such information to an officer in charge of a police station or any police officer whose duty is to receive such information.



(c) Such information shall be reduced to writing and entered in a book in accordance with subsections (1) and (2) and shall subsequently be signed by the person who gave the information.

(4) A police officer shall be duty bound to receive any information in relation to any offence committed anywhere in Malaysia.

[75] Any police officer is duty bound to receive any information in relation to any offence committed anywhere in Malaysia. And the report of an offence can be made to any police officer and the said report is deemed to be received at the police station. The police officer receiving the report must record in writing the name, address of the informant and the date and time of the receipt of such information.

[76] The word “information” is not defined in the CPC. But the word “complaint” is defined in s 2 of the CPC as an “allegation made orally or in writing to a magistrate with a view to his taking action under this Code that some person whether known or unknown has committed or is guilty of an offence”. According to Thomson CJ in *PP v. Leonard* [1960] 26 MLJ 13, CA, at pp. 14 to 15:

Then there may be an information and there may be a complaint, but an information and a complaint are entirely different things and the failure to distinguish between them can lead to very great confusion in thought. An information is a statement relating to the commission of an offence made to a Police Officer under section 107 of the Code and a complaint is an allegation made to a Magistrate with a view to his taking action under the Code.

[77] Even though SP7 received the information on 20 August 2002, he did not reduce that information in writing as required by s 107(1) of the CPC. It was only after the successful arrest of both the appellants and the seizure of the dangerous drugs in the box, a police report was lodged by SP6 on 25 August 2002 at 4.20am as per exh. P17. We are constrained to say that despite the fact that SP7 had acted on information received from the informer, it cannot per se be construed as hearsay, prejudicial and inadmissible in one breath. We must look at the whole evidence in its correct perspective. In our judgment there was ample evidence through the agent provocateur - SP4, upon which the learned JC could find both the appellants guilty of trafficking in the dangerous drugs as per the charge and convict them accordingly without occasioning any miscarriage of justice. There was also supportive evidence of SP5, SP6 and SP9 - all pointing to the guilt of both the appellants.

[78] In *Ooi Hock Leong v. Regina* [1955] 1 MLRH 719; [1955] 21 MLJ 229, 230, Spenser Wilkinson J held that “the fact that the complainant’s report was not produced and that the conviction of the principal thief was not strictly proved I came to the conclusion that there remained ample evidence upon which the



learned magistrate could find as he did and there was no failure of justice, and I therefore dismissed the appeal."

[79] The facts in *Chan King Yu v. PP (supra)*, a decision of the Federal Court, showed that the appellant was arrested in a hotel room that he had checked in after a police party raided the room. The drugs were found in the room at the time of his arrest. The main issue was whether the lower courts failed to give proper consideration to the facts and evidence of the case that pointed to the possibility that the case was framed against the appellant. The Federal Court held by way of a majority (Hashim Yusof FCJ and Zulkefli Makinudin FCJ) that there were infirmities and glaring discrepancies in the prosecution's case and that the defence had succeeded in raising a reasonable doubt on the prosecution's case. There was evidence that the appellant from the time of his arrest and throughout the entire trial had consistently maintained that he had no knowledge of the drugs and that the drugs found in the three plastic bags in hotel room 1303 in fact belonged to the person named Man Chai and that the appellant genuinely believed that the three plastic bags contained tools. The defence was not one of mere denial but there was an explanation that the drugs could have belonged to Man Chai and that Man Chai could have been the trafficker. That the appellant was at most an innocent carrier.

[80] By way of a majority, the Federal Court further held that in *Chan King Yu's* case, the police failed to investigate the local telephone numbers and the last ten calls made and received by the appellant. That would have led to the discovery of the people the appellant was in contact with, and to the existence of one Man Chai. It was held that Man Chai was not a fictitious character and that Man Chai played a major role in leading the police party to effect the arrest on the appellant. It was also held that the police had all the time to check the veracity of the material particulars relating to the existence of Man Chai that was disclosed by the appellant in his cautioned statement. It was further held that the burden was on the prosecution to check whether the appellant's version of the facts as they appeared in the cautioned statement was true or false.

[81] Again by way of a majority the Federal Court also held in *Chan King Yu's* case that there was evidence to show that the raiding party intentionally destroyed crucial evidence to cover up the first raid conducted in the absence of the appellant to plant the said drugs and implicate the appellant. It was also held that there were material contradictions or discrepancies in the evidence of the prosecution witnesses when compared with that of the defence witnesses. Finally, it was further held that since the police party acted on information received to arrest and detain the appellant such information was said to be hearsay, prejudicial to the appellant and therefore inadmissible.

[82] By way of a dissenting judgment, Abdul Aziz Mohamad FCJ held that the trial judge's rejection of the defence was made upon an objective consideration of all the admissible evidence from which he found that the appellant was in



possession of the drugs. His Lordship further held that the trial judge rejected the defence, which involved Man Chai, because with the finding that the appellant was in possession of the drugs, it made no difference to his guilt if he was keeping the drugs for Man Chai who was said to be coming to the hotel to collect it. His Lordship also held that the trial judge's mention of the information received by the police and of the appellant being the target of the police and not Man Chai was merely to imply that the focus of the police operation and of the case was the appellant. Finally, his Lordship held that the appellant's guilt was established by proof of possession and not that of Man Chai, whatever his concern with the drugs might have been.

[83] The facts in the present appeal are poles apart from the facts in Chan King Yu's case. Just like Abdul Aziz Mohamad FCJ, we do not find anything objectionable when SP7 acted on information received from the informer although that information was not reduced in writing as required by s 107(1) of the CPC. As it turned out, the information was really true.

[84] There was no ample evidence to convict the appellant of trafficking in drugs in Chan King Yu's case and that was the reason why the appellant's conviction and sentence of death were set aside by the Federal Court by way of a majority. Here, as demonstrated earlier in this judgment, there was more than ample evidence to convict both the appellants as per the charge.

[85] What is hearsay? It is defined by Mr LMD De Silva for the Privy Council in *Subramaniam v. PP* [1956] 1 WLR 965 at p. 970, PC in this way:

Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.

[86] The appellant in *Subramaniam v. PP* (*supra*) was charged with being in possession of firearms without lawful excuse and his defence was that he was acting under duress in consequence of threats uttered by Malayan terrorists. The judge would not allow the accused to state what had been said by the terrorists and the Judicial Committee advised that the conviction should be quashed because the reported statements were tendered as original evidence and ought to have been received as such.

[87] The decision in *Subramaniam v. PP* (*supra*) was also applied in *Mawaz Khan and Amanat Khan v. The Queen* [1967] 1 AC 454, PC, [1967] 1 All ER 80, PC, where each appellant made a statement in the absence of the other setting up the same demonstrably false alibi. It was held that these statements were



admissible, not, of course, in order to establish their truth, but in furtherance of the Crown's contention that the appellants were conspiring to fabricate evidence.

[88] There is always the danger that hearsay evidence may be concocted because the maker is not called. Here, the informer was not called and so SP7's evidence in regard to the information that one male Indian was offering to sell 20 kilogrammes of ganja at the price of RM1,200 per kilogramme was not reduced in writing in compliance with s 107(1) of the CPC and it may have been concocted. But the evidence of SP4 as an agent provocateur who saw and heard what had transpired showed that it was not a concoction. It really happened. Section 40A of the Act, as framed by Parliament, excludes the hearsay rule entirely and that section applies to SP4 as an agent provocateur. And SP5, SP6 and SP9 supported the evidence of SP4.

[89] SP7 received the information from the informer and pursuant to that information SP4 was directed to act as an agent provocateur. The informer in this case merely played a minor role of introducing SP4 to both the appellants. That is the degree of the informer's participation. The informer here has not assumed the role of an agent provocateur (*PP v. Chong Chee Kin & Anor* [1995] 4 MLRH 851; [1995] 2 MLJ 679; *Lee Lee Chong v. PP* [1998] 2 MLRA 111; [1998] 4 MLJ 697; [1998] 4 CLJ 655; [1999] 1 AMR 925, CA; *PP v. Chong Nyuk Min & Anor* [1995] 4 MLRH 531; [1995] 3 MLJ 642; *K Saravanan S Karuppiah v. PP* [2002] 1 MLRA 539; [2002] 3 MLJ 465; [2002] 4 CLJ 144; [2002] 3 AMR 3214; [2002] 3 AMR 3214, CA; *PP lwn. Mohd Isha Alias & Satu Lagi* [2003] 1 MLRA 66; [2003] 3 MLJ 305; [2003] 2 CLJ 142; [2003] 4 AMR 180, CA; and *PP v. Mansor bin Md Rashid & Anor* [1996] 2 MLRA 35; [1996] 3 MLJ 560; [1997] 1 CLJ 233 FC).

[90] The informer here was protected by s 40 of the Act and the learned JC rightly held that the prosecution was correct in not calling the informer to give evidence. It is now appropriate to reproduce s 40 of the Act. It reads as follows:

Protection of informers

40.(1) Except as hereinafter provided, no complaint as to an offence under this Act shall be admitted in evidence in any civil or criminal proceeding whatsoever, and no witness shall be obliged or permitted to disclose the name or address of any informer, or state any matter which might lead to his discovery.

(2) If any books, documents or papers which are in evidence or liable to inspection in any civil or criminal proceeding whatsoever contain any entry in which any informer is named or described or which might lead to his discovery, the Court before which the proceeding is had shall cause all such passages to be concealed from view or to be obliterated so far as is necessary to protect the informer from discovery, but no further.



(3) If on trial for any offence under this Act the Court, after full inquiry into the case, is of opinion that the informer wilfully made in his complaint a material statement which he knew or believed to be false or did not believe to be true, or if in any other proceeding the Court is of opinion that justice cannot be fully done between the parties thereto without the discovery of the informer, the Court may require the production of the original complaint, if in writing, and permit inquiry and require full disclosure concerning the informer.

[91] Here, the learned JC did not express any opinion pursuant to s 40(3) of the Act. Put in another way, the learned JC did not express an opinion that the informer wilfully made in his complaint a material statement which the informer knew or believed to be false or did not believe to be true. Neither was the learned JC of the opinion that justice cannot be fully done between the parties thereto without the discovery of the informer which necessitates the production of the original complaint, if in writing, and permit inquiry and require full disclosure concerning the informer.

[92] So, we have a situation where the informer was fully protected under s 40 of the Act and there was no necessity for him to come to court to give evidence. It makes no sense to have s 40 of the Act and yet the informer's identity be made known. It is a long established rule of law that witnesses may not be asked and should not be allowed to disclose the names of informers or the nature of the information given (Hardy [1794] 24 State Tr 199). The rationale for this simple rule was explained by Lawton LJ in *R v. Timothy John Hennessey* [1979] 68 Cr App R 419, at p. 426:

The courts appreciate the need to protect the identity of informers, not only for their own safety but to ensure that the supply of information about criminal activities does not dry up.

[93] It is our judgment that s 40 of the Act creates a statutory exception to the hearsay rule, and that there is no necessity for the informer to appear in court and testify. If informers are required to testify, then there will be a day when information pertaining to criminal activities stop coming and the crime rates will go up.

[94] We are aware of what Lawton LJ said in *R v. Timothy John Hennessey* (*supra*) at p. 425:

Subject to a few exceptions witnesses, whether for the prosecution or the defence, are required to testify what they saw, heard, smelt or felt and not to what they know because of what they have been told.

[95] In *The Queen v. Benz And Another* [1989] 168 CLR 110, at 144, Gaudron and McHugh JJ said that a strong case could be made for admitting hearsay evidence where it appears to have a high degree of reliability.



[96] In *Walton v. The Queen* [1989] 166 CLR 283, at 293, Mason CJ said:

The hearsay rule should not be applied inflexibly. When the dangers which the rule seeks to prevent are not present or are negligible in the circumstances of a given case there is no basis for a strict application of the rule. Equally, where in the view of the trial judge those dangers are outweighed by other aspects of the case lending reliability and probative value to the impugned evidence, the judge should not then exclude the evidence by a rigid and technical application of the rule against hearsay. It must be borne in mind that the dangers against which the rule is directed are often very considerable, as evidenced by the need for the rule itself.

[97] *Vijayaratnam v. PP* [1961] 1 MLRH 553; [1962] 1 MLJ 106 was a case where the appellant there was charged under s 381 of the Penal Code and Hashim J said that the expression “on information received” should not be used by police officers when giving evidence as its use may cloud the issue and/or prejudice the court against the accused and this case was also used by learned counsel to bolster its argument that SP7 had acted on information received which was said to be prejudicial to both the appellants.

[98] It is obvious that the facts in *Vijayaratnam v. PP* (*supra*) are different from the facts of the present appeal. There was no informer involved. And that case was decided on 18 October 1961 and only reported in 1962. Times have changed and inroads into the hearsay rule have been made.

[99] Even though *Chan King Yu*’s case was a drug trafficking case, yet that case, with respect, did not consider the need to protect the identity and safety of informers. That case too did not consider the provisions of s 107(1) of the CPC and the statutory protection accorded to informers generally under s 40 of the Act. And there was no agent provocateur in that case.

[100] Be that as it may, it is perhaps opportune to refer to the speech of Lord Goddard CJ, on behalf of the board, in the case of *Kuruma, Son of Kaniu v. The Queen* [1955] AC 197, at p. 203. There his Lordship said:

... the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case there are decisions which support it, and in their Lordships’ opinion it is plainly right in principle.

[101] Next, it was argued that the evidence of the Government Chemist - SP1, was not credible and the defence also questioned the method of analysis and the weight of the drugs that was arrived at. But the law is quite clear. We have to accept the evidence of the Government Chemist at face value (*Khoo Hi Chiang v. PP & Another Case* [1993] 1 MLRA 701; [1994] 1 MLJ 265; [1994] 2



CLJ 151; [1994] 1 AMR 323,; *Munusamy v. PP (supra)*; *PP v. Lam San* [1991] 1 MLRA 219; [1991] 3 MLJ 426; [1991] 1 CLJ (Rep) 391, SC; *Looi Kow Chai & Anor v. PP (supra)*; *Balachandran v. PP (supra)*; *Gunalan Ramachandran & Ors v. PP* [2004] 2 MLRA 180; [2004] 4 MLJ 489; [2004] 4 CLJ 551; [2004] 6 AMR 189, CA; and *PP v. Ooi Teng Chian* [2005] 2 MLRA 199; [2006] 1 MLJ 213; [2005] 4 CLJ 557; [2006] 2 AMR 136, CA).

[102] We have perused through the evidence of the Government Chemist in the appeal record and we found that the evidence of the Government Chemist to be relevant, credible and acceptable. The defence did not call rebuttal evidence to challenge the evidence of the Government Chemist.

[103] The procedure for admittance of expert evidence is housed in s 399 of the CPC and its acceptance is regulated by s 45 of the Evidence Act 1950. We are satisfied with the evidence of the Government Chemist and the analysis carried out by him showed that the compressed dried leaves were cannabis, a dangerous drug, weighing 6004.3 grammes.

[104] It is our judgment, on the available evidence, that the convictions are safe. It is also our judgment that both the appellants had failed to raise any reasonable doubt as to their guilt. We are satisfied that the prosecution had proved beyond reasonable doubt the charge against both the appellants. Accordingly, we dismissed both the appellants' appeal. Their convictions and sentences are hereby affirmed.



Kagatree a/p Pechi v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL
NOS A-05(M)-173-06 OF 2020 AND A-05(M)-180-06 OF 2020
HAS ZANAH MEHAT, AHMAD NASFY AND NORDIN HASSAN JJCA
16 FEBRUARY 2023

Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellants charged for murder under s 302 of the Penal Code read together with s 34 of same Code — Appellants convicted and sentenced to death — Whether prima facie case had been established and prosecution had proven its case beyond any reasonable doubt — Whether there was common intention — Whether principle of ‘last seen together’ was wrongly applied — Whether circumstantial evidence established against appellants — Whether first appellant owed no duty to save victim — Whether trial judge erred in making material inferences and presumptions that were in favour of prosecution and failed to give benefit of doubt to first appellant — Whether trial judge failed to consider unsworn statement of second appellant — Penal Code ss 34 & 302

Kagatree d/o Pechi (‘the first appellant’) and Murugan s/o Perumal (‘the second appellant’) were convicted by the High Court for the offence of murder of Ng Poh Tim (‘the victim’), an offence punishable under s 302 of the Penal Code (‘the PC’) read together with s 34 of the same Code. On 27 June 2016, at about 3pm, the victim’s daughter when returning from school, noticed that the gate of her house at No 2 was open. Upon entering the house, she found the house was ransacked and coins were scattered on the floor. She then tried to locate the victim in the house but failed. She was terrified and immediately telephoned her father (‘PW10’) informing him of the situation. PW10 then arrived at the house and searched for the victim at the said house and another house of his, at No 19, which was in front of their house. Upon searching the upper floor of house No 19, SP10 found the victim was motionless with her mouth gagged tightly with black cellophane tape. The victim’s wrists and ankles were also bound with cellophane tape. PW10 untied the victim and brought her to the hospital but the victim was pronounced dead. PW10 also realised that many of his and her daughter’s belonging as well as other household items in house No 2 were missing. He reported this to the police in his police report. A post mortem was carried out and it was concluded that the cause of death was asphyxia due to smothering. The prosecution tendered CCTV recordings that showed the victim entered house No 19, later followed by the first appellant and a man. However, only the first appellant and the man left the said house No 19. The first appellant went into house No 2 and then left the place with the man on a motorcycle. Subsequently, the appellants were arrested at a house in Sungai

A Petani. The first appellant showed the police the spot where the items were thrown. Further, the second appellant brought the police to the same house at Sungai Petani and showed the police a T-shirt that he said was worn by him during the incident at the victim's place. The man in the CCTV recording was seen wearing a similar T-shirt shown by the second appellant to the police. The appellants were charged for murder and the trial judge found that the prosecution had established a prima facie case against both the appellants. The first appellant gave her evidence on oath. In essence, her defence was that she did not murder the victim or conspire with anybody to commit the murder. On the other hand, the second appellant gave an unsworn statement from the dock and denied committing the offence of murder of the victim. The trial judge found that both appellants had failed to raise a reasonable doubt on the prosecution case. As such, both the appellants were convicted for the offence of murder of the victim and were sentenced to a mandatory death sentence. Hence, these appeals by the appellants.

D

Held, dismissing the appeal:

- (1) The evidence led by the prosecution based on strong circumstantial evidence had proved that the second appellant had intentionally caused the injury to the victim with the common intention of the first appellant, which in the ordinary course of nature would cause death. Clause (c) of s 300 of the PC was applicable and the prosecution had succeeded in proving this clause to prove the offence of murder against the victim. The decision of the trial judge that the prosecution had proved a prima facie case at the end of the prosecution case on maximum evaluation was correct and there was no reason to interfere in the findings of fact based on the credibility of prosecution's witnesses. Next, the first appellant denied committing the offence and shifted the blame to a person known as Raja. The character of Raja was never raised during the investigation or at the prosecution stage. It was only raised at the defence stage. In the circumstances, the trial judge was entitled to make a finding that the defence was an afterthought. The defence of the first appellant had not raised any reasonable doubt. The second appellant's defence was a mere denial. The defence did not answer the prosecution case, including the second appellant depicted in the CCTV recording wearing the same T-shirt that the second appellant showed to the police in the rented house in Sungai Petani. The trial judge correctly evaluated the defence of the second appellant and found that the defence had also failed to raise any reasonable doubt (see paras 34, 36–38 & 41–42).
- (2) There was a common intention by the appellants which resulted in the death of the victim. This attracted the offence of murder by both the appellants punishable under s 302 of the PC. Although at the end of the prosecution case, the trial judge did not state whether the common intention had been established, the law was trite that at the appeal stage,

- the court may review the evidence and determine whether common intention had been proven. In the circumstances, the contention that there was no common intention to murder by both the appellants was bereft of any merit (see paras 52–54). A
- (3) The evidence of ‘last seen together’ was not the only evidence presented by the prosecution. There was ample other evidence produced before the court to show the first appellant’s common intention with the second appellant’s in the offence of murder against the victim. Further, the time gap between the appellants’ last seen with the victim alive was only a short while before PW10 found the victim motionless in house No 19. The trial judge was not wrong in applying the doctrine of ‘last seen together’ against the appellants (see paras 59–60). B C
- (4) There was ample circumstantial evidence tendered in court by the prosecution where its cumulative effect had established a case against the appellants beyond a reasonable doubt. The DNA and fingerprint evidence were only corroborative evidence and its absence would not affect the prosecution’s case if there was other evidence to establish its case. The available circumstantial evidence was not in favour of the first appellant’s innocence. The circumstantial evidence had proved the case for the prosecution against the appellants, and therefore, the appellants’ contention on this issue was untenable (see paras 65–67). D E
- (5) The charge against the appellants was for the offence of murder with the common intention of both of them. What was important was the prosecution had established its case against both appellants based on the strong circumstantial evidence. The omission to report to the police or take any action to save the victim would only add another piece of circumstantial evidence against the first appellant as that would be the reasonable action to be taken unless the first appellant participated in the offence. The issue raised by the first appellant did not have any material weight that affected the prosecution’s case (see paras 69–70). F G
- (6) The inferences made by the trial judge were reasonable and logical. The inferences were made based on the proven facts in this case. The trial judge had made inferences that were in favour of the prosecution. There were no two or more inferences that could reasonably be made from the proven facts in this case and as such, the inferences in favour of the first appellant did not arise (see paras 73 & 75). H
- (7) The trial judge did consider the unsworn statement of the second appellant in sufficient detail. The contention of the second appellant was without basis (see para 76). I

A [Bahasa Malaysia summary]

- B** Kagatree a/p Pechi ('perayu pertama') dan Murugan a/l Perumal ('perayu kedua') telah disabitkan oleh Mahkamah Tinggi atas kesalahan membunuh Ng Poh Tim ('mangsa'), suatu kesalahan boleh dihukum di bawah s 302 Kanun Keseksaan ('KK') dibaca bersama dengan s 34 Kanun yang sama. Pada 27 Jun 2016, kira-kira jam 3 petang, anak perempuan mangsa ketika pulang dari sekolah, menyedari pintu pagar rumahnya di No 2 terbuka. Apabila memasuki rumah, dia mendapati rumah itu dikedah dan syiling bertaburan di atas lantai. Dia kemudian cuba mengesan mangsa di dalam rumah tetapi gagal. Dia ketakutan dan segera menelefon bapanya ('PW10') memaklumkan keadaan itu. PW10 kemudian tiba di rumah dan mencari mangsa di rumah tersebut dan sebuah lagi rumahnya, di No 19, yang terletak di hadapan rumah mereka. Ketika menggedah tingkat atas rumah No 19, SP10 mendapati mangsa tidak bergerak dengan mulut tersumbat dengan pita selofan hitam. Pergelangan tangan dan buku lali mangsa turut diikat dengan pita selofan. PW10 membuka ikatan mangsa dan membawanya ke hospital tetapi mangsa disahkan meninggal dunia. PW10 juga menyedari bahawa banyak barang miliknya dan anak perempuannya serta barangan rumah lain di rumah No 2 hilang. Dia melaporkan perkara ini kepada polis dalam laporan polisnya. Bedah siasat telah dijalankan dan disimpulkan bahawa punca kematian adalah asfiksia akibat tercekik. Pihak pendakwaan mengemukakan rakaman CCTV yang menunjukkan mangsa memasuki rumah No 19, kemudian diikuti oleh perayu pertama dan seorang lelaki. Bagaimanapun, hanya perayu pertama dan lelaki itu meninggalkan rumah No 19 tersebut. Perayu pertama masuk ke rumah No 2 dan kemudian meninggalkan tempat itu bersama lelaki itu menaiki motosikal. Selepas itu, perayu-perayu telah ditangkap di sebuah rumah di Sungai Petani. Perayu pertama menunjukkan kepada polis tempat di mana barang-barang itu dibuang. Selanjutnya, perayu kedua membawa polis ke rumah yang sama di Sungai Petani dan menunjukkan kepada polis sehelai baju-T yang menurutnya dipakai olehnya semasa kejadian di tempat mangsa. Lelaki dalam rakaman CCTV itu dilihat memakai baju-T serupa yang ditunjukkan oleh perayu kedua kepada polis. Perayu-perayu didakwa atas tuduhan membunuh dan hakim bicara mendapati pihak pendakwaan telah membuktikan kes prima facie terhadap kedua-dua perayu. Perayu pertama memberikan keterangannya secara bersumpah. Pada dasarnya, pembelaannya ialah dia tidak membunuh mangsa atau bersubahat dengan sesiapa pun untuk melakukan pembunuhan itu. Sebaliknya, perayu kedua memberi akuan tidak bersumpah daripada kandang tertuduh dan menafikan melakukan kesalahan membunuh mangsa. Hakim bicara mendapati kedua-dua perayu gagal menimbulkan keraguan munasabah terhadap kes pendakwaan. Oleh yang demikian, kedua-dua perayu telah disabitkan atas kesalahan membunuh mangsa dan dijatuhkan hukuman mati mandatori. Oleh itu, rayuan-rayuan ini oleh perayu-perayu.

Diputuskan, menolak rayuan:

- (1) Keterangan yang diketuai oleh pihak pendakwaan berdasarkan keterangan mengikut keadaan yang kukuh telah membuktikan bahawa perayu kedua telah dengan sengaja menyebabkan kecederaan kepada mangsa dengan niat bersama perayu pertama, pada lazimnya bagi menyebabkan kematian. Klausula (c) s 300 KK adalah terpakai dan pihak pendakwaan telah berjaya membuktikan klausula ini untuk membuktikan kesalahan membunuh terhadap mangsa. Keputusan hakim bicara bahawa pihak pendakwaan telah membuktikan kes prima facie pada akhir kes pendakwaan pada penilaian maksimum adalah betul dan tidak ada sebab untuk campur tangan dalam penemuan fakta berdasarkan kredibiliti saksi pendakwaan. Seterusnya, perayu pertama menafikan melakukan kesalahan itu dan mengalihkan kesalahan kepada seseorang yang dikenali sebagai Raja. Watak Raja tidak pernah dibangkitkan semasa siasatan mahupun di peringkat pendakwaan. Ia hanya dibangkitkan di peringkat pembelaan. Dalam keadaan itu, hakim bicara berhak membuat keputusan bahawa pembelaan itu adalah sesuatu yang difikirkan kemudian. Pembelaan perayu pertama tidak menimbulkan sebarang keraguan munasabah. Pembelaan perayu kedua adalah penafian semata-mata. Pihak pembelaan tidak menjawab kes pendakwaan, termasuk perayu kedua yang digambarkan dalam CCTV memakai baju-T sama yang ditunjukkan oleh perayu kedua kepada polis di rumah sewa di Sungai Petani itu. Hakim bicara dengan betul menilai pembelaan perayu kedua dan mendapati pembelaan juga gagal menimbulkan sebarang keraguan munasabah (lihat perenggan 34, 36–38 & 41–42).
- (2) Terdapat niat bersama oleh perayu yang mengakibatkan kematian mangsa. Ini menarik kesalahan pembunuhan oleh kedua-dua perayu yang boleh dihukum di bawah s 302 KK. Walaupun pada akhir kes pendakwaan, hakim bicara tidak menyatakan sama ada niat bersama telah diwujudkan, undang-undang adalah mantap bahawa pada peringkat rayuan, mahkamah boleh menyemak keterangan dan menentukan sama ada niat bersama telah dibuktikan. Dalam keadaan tersebut, pertikaian bahawa tiada niat bersama untuk membunuh oleh kedua-dua perayu telah kehilangan sebarang merit (lihat perenggan 52–54).
- (3) Keterangan ‘terakhir dilihat bersama’ bukanlah satu-satunya keterangan yang dikemukakan oleh pihak pendakwaan. Terdapat banyak keterangan lain yang dikemukakan di hadapan mahkamah untuk menunjukkan niat bersama perayu pertama dengan perayu kedua dalam kesalahan membunuh terhadap mangsa. Seterusnya, jurang masa antara kali terakhir perayu dilihat dengan mangsa masih hidup hanya seketika sebelum PW10 mendapati mangsa tidak bergerak di rumah No 19. Hakim bicara tidak salah dalam menggunakan doktrin ‘terakhir dilihat

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- A bersama' terhadap perayu (lihat perenggan 59–60).
- (4) Terdapat banyak keterangan mengikut keadaan yang dikemukakan di mahkamah oleh pihak pendakwaan di mana kesan kumulatifnya telah membuktikan kes terhadap perayu-perayu melampaui keraguan munasabah. Bukti DNA dan cap jari hanyalah keterangan yang menyokong dan ketiadaannya tidak akan menjejaskan kes pendakwaan jika terdapat keterangan lain untuk membuktikan kesnya. Keterangan keadaan yang ada tidak memihak kepada ketidakbersalahan perayu pertama. Keterangan mengikut keadaan telah membuktikan kes untuk pendakwaan terhadap perayu, dan oleh itu, pertikaian perayu mengenai isu ini tidak dapat dipertahankan (lihat perenggan 65–67).
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- (5) Pertuduhan terhadap perayu adalah bagi kesalahan membunuh dengan niat bersama kedua-duanya. Apa yang penting ialah pihak pendakwaan telah membuktikan kesnya terhadap kedua-dua perayu berdasarkan keterangan keadaan yang kukuh. Ketiadaan untuk melaporkan kepada polis atau mengambil sebarang tindakan untuk menyelamatkan mangsa hanya akan menambah satu lagi keterangan mengikut keadaan terhadap perayu pertama kerana itu adalah tindakan munasabah yang perlu diambil melainkan perayu pertama mengambil bahagian dalam kesalahan itu. Isu yang dibangkitkan oleh perayu pertama tidak mempunyai sebarang berat material yang menjejaskan kes pendakwaan (lihat perenggan 69–70).
- D
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- (6) Inferens yang dibuat oleh hakim bicara adalah munasabah dan logik. Inferens dibuat berdasarkan fakta yang terbukti dalam kes ini. Hakim bicara telah membuat kesimpulan yang memihak kepada pihak pendakwaan. Tiada dua atau lebih inferens yang boleh dibuat secara munasabah daripada fakta terbukti dalam kes ini dan oleh itu, inferens yang memihak kepada perayu pertama tidak timbul (lihat perenggan 73 & 75).
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- (7) Hakim bicara telah mempertimbangkan pernyataan tidak bersumpah perayu kedua dengan cukup terperinci. Pertikaian perayu kedua adalah tanpa asas (lihat perenggan 76).]
- H

Cases referred to

- Alcontara all Ambross Anthony v PP* [1996] 1 MLJ 209; [1996] 1 CLJ 75, FC (refd)
- Dato Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232; [1983] 2 CLJ 10, FC (refd)
- Dato' Seri Anwar bin Ibrahim v PP* [2014] 3 MLJ 774; [2015] 2 CLJ 145, FC (refd)
- Farose bin Tamure Mohamad Khan v PP and other appeals* [2016] 6 MLJ 277; [2016] 9 CLJ 769, FC (refd)

- Khoo Hi Chiang v PP and another appeal* [1994] 1 MLJ 265; [1994] 2 CLJ 151, SC (refd) A
- Lee Ah Seng & Anor v PP* [2007] 6 MLJ 1; [2007] 5 CLJ 1 (refd)
- Low Kian Boon & Anor v PP* [2010] 4 MLJ 425; [2010] 5 CLJ 489, FC (refd)
- Mohd Shawal bin Abdullah v Pendakwa Raya* (Criminal Appeal No K-05(M)-160-04 of 2016) (unreported), CA (refd) B
- PP v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579, FC (refd)
- PP v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
- Salem ak Brayon v PP* [2023] 1 MLJ 441; [2022] 1 LNS 2917, CA (refd) C
- Tan Kim Ho & Anor v PP* [2009] 3 MLJ 151; [2009] 3 CLJ 236, FC (refd)
- Teng Howe Seng v PP* [2009] 3 MLJ 46, FC (refd)
- Tham Kai Yau & Ors v PP* [1977] 1 MLJ 174, FC (refd)
- Virsa Singh v State of Punjab* AIR 1958 465, SC (refd) D
- Zulkiple bin Mohamad v PP* [2022] 1 MLJ 479; [2022] 1 CLJ 673, FC (refd)

Legislation referred to

Penal Code ss 34, 300, 300(c), 302

Appeal from: *Public Prosecutor v Kagatree alp Pechi & Anor* [2020] MLJU 1746 (High Court, Taiping) E

P Ravee (with R Pavithira) (P Ravee & Co & Nurul & Charan) for the appellant. Mohd Khushairy bin Ibrahim (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent F

Nordin Hassan JCA (delivering judgment of the court):

[1] Kagatree d/o Pechi, the first appellant, and Murugan s/o Perumal, the second appellant, were convicted by the Taiping High Court for the offence of murder of one Ng Poh Tim ('the victim'), an offence punishable under s 302 of the Penal Code read together with s 34 of the same Code. The appellants were then sentenced to death for the offence. G

[2] The charge preferred against the appellants by the prosecution was as follows: H

Bahawa kamu dengan niat bersama pada 27.6.2016, jam lebih kurang 4.00 petang, bertempat di rumah alamat No. 19, Lorong 7A Taman Kota Jaya, Simpang, Taiping, di dalam Daerah Larut Matang, dalam Negeri Perak, telah membunuh NG POH TIM, No. kp: 670221-10-6198, dan dengan itu kamu, telah melakukan kesalahan membunuh yang boleh dihukum di bawah seksyen 302 Kanun Keseksan dan dibaca bersama di bawah seksyen 34 Akta yang sama. I

- A [3] Aggrieved with the decision of the High Court, the appellants filed an appeal to this court against the conviction and sentence.

THE PROSECUTION CASE

- B [4] The narrative of the prosecution case from the evidence adduced during the trial is as follows. On 27 June 2016, at about 3pm, the victim's daughter, Lim Yee Wei ('PW8'), when returning from school, noticed that the gate of her house No 2, Lorong 7A, Taman Kota Jaya, Simpang, Perak was open. Upon entering the house, she found the house was ransacked and coins were scattered on the floor. She then tried to locate the victim in the house but failed. She was terrified and immediately telephoned her father, Lim Eng Kiat ('PW10'), informing him of the situation.

- D [5] PW10 then arrived at the house and searched for the victim at the said house and another house of his, at No 19, which was in front of house No 2. house No 19 was vacant and meant to be rented out. When his search was futile, PW10 reported the matter to the police at Simpang Polis Station, where he was advised by the police to return home and to search thoroughly for his wife. PW10 then went home and continued his search at house No 19. Upon searching the upper floor of house No 19, SP10 found the victim was motionless with her mouth gagged tightly with black cellophane tape. The victim's wrists and ankles were also bound with cellophane tape. Using a scissor, PW10 untied the victim and brought her to Hospital Raja Permaisuri Bainun, F Ipoh, Perak. However, at the hospital, the victim was pronounced dead.

- G [6] PW10 also realized that many of his and her daughter's belonging as well as other household items in house No 2 were missing. He reported this to the police in his police report dated 3 July 2016, Taiping police report, No 005575/16.

- H [7] A post mortem was then carried out on the victim's body by Dr Siti Zanariah bt Md Naziri (PW6) who concluded that the cause of death was asphyxia due to smothering.

- I [8] The prosecution also tendered CCTV recordings, which were the CCTV from a neighbour's house (P29) and CCTV from house No 2 (P55, P56, P57, and P58). The recordings, clearly show the first appellant going back and forth between house No 2 and house No 19. It also showed the first appellant rushing into and out of house No 2. Pertinently, there was a recording that shows the victim entered house No 19, later followed by the first appellant and a man. However, only the first appellant and the man left the said house No 19. The first appellant went into house No 2 and then left the place with the

man on a motorcycle. The man was wearing a T shirt. There was also footage of a motorcycle used at the material time bearing registration No AJY 7537.

A

[9] PW10 also testified that house No 19 was also his house which was meant to be rented out. house No 19 and house No 2 were in front of each other and divided by a road at Taman Kota Jaya, Simpang, Taiping. PW10 was also informed by the victim that she will get a cleaner to clean house No 19 before it was rented out.

B

[10] Moving on, the investigating officer, PW16, went to both houses after the incident. He noticed that house No 2 was ransacked and was informed by PW10 that many of his daughter's and the victim's belongings were missing as well as a CCTV decoder in the said house.

C

[11] Thereafter, based on information received by PW16 of the whereabouts of both appellants, on 11 July 2016, at about 9pm, PW16 sent his team to make an observation of a house at No 101, Jalan Anggerik, Taman Angerik, Aman Jaya, Sungai Petani, Kedah. Having been informed that the appellants were in the house compound, PW16 headed a team and raided the house where the appellants were then arrested. In the main bedroom of the house, the following items were found:

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- (a) a Rado wristwatch;
- (b) an Asus handphone with a simcard;
- (c) a white electronic dictionary;
- (d) a white Samsung handphone;
- (e) a white helmet with a visor;
- (f) a black helmet with a visor;
- (g) a blue short sleeve shirt;
- (h) a black long pants;
- (i) a short sleeve collar T-shirt; and
- (j) a black short pants.

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[12] The police also confiscated a motorcycle bearing registration No AJY 7537 from the house's compound.

I

[13] Next, the first appellant informed PW16 that she can show the police the place where other items that were taken from house No 2 in Taiping which were thrown away by the first and second appellants. The items were placed in a blue plastic bag and thrown in bushes on the roadside at Jalan Tekkah Permai,

- A** Taman Tekkah Permai, Aulong, Taiping. The first appellant then brought PW16 and his team to the location and showed them the spot where the items were thrown. Upon searching the spot shown by the first appellant, PW16 found a big blue plastic bag that contained the following items:
- B** (a) a brown sling bag;
- (b) a digital video decoder;
- (c) a silver electronic gadget;
- (d) a Samnio culcalator;
- C** (e) a wallet;
- (f) a dark blue Tab cover;
- (g) two bunch of keys;
- D** (h) two house fence remote control;
- (i) one Rado wristwatch chain;
- (j) the victim's MyKad;
- (k) the victim's driving license;
- E** (l) the victim's vocational license;
- (m) the victim's CIMB preferred card;
- (n) the victim's Public Bank credit card;
- F** (o) a CIMB ATM card;
- (p) an RHB ATM card;
- (q) PW10 Bonus Link card;
- G** (r) PW8 Popular student card;
- (s) the victim's 'the Store' card;
- (t) the victim's Smart Assist Perdua card;
- (u) the victim's Aeon card;
- H** (v) a TESCO card;
- (w) PW8 school's card;
- (x) a resit;
- I** (y) the victim's water bill; and
- (z) a water bill under the name of PW10 and the victim's company.

[14] Further, on 20 July 2016, the second appellant brought the police to the

same house at Sungai Petani and showed the police a T-shirt that he said was worn by him during the incident at the victim's place. The man in the CCTV recording was seen wearing a similar T-shirt shown by the second appellant to the police.

A

[15] Next, upon further investigation, it was found that the motorcycle bearing registration AJY 7537, confiscated from the house at Sungai Petani, was registered under the first appellant's name.

B

[16] PW10 and PW8 then identified the victim's and their belongings that were found at the house in Sungai Petani and the place shown by the first appellant at Taman Tekkah, Aulong, Taiping.

C

THE DECISION OF THE TRIAL JUDGE AT THE CLOSE OF THE PROSECUTION CASE

D

[17] Having considered the prosecution evidence on maximum evaluation and credibility of prosecution witnesses, the trial judge found that the prosecution has established a prima facie case against both the appellants on the charge preferred against them. This was stated in the notes of proceedings in the following words:

E

Keputusan di akhir kes Pendakwaan

Setelah membuat penilaian maksima ke atas kes Pendakwaan yang dikemukakan melalui keterangan saksi dan ekshibit-ekshibit dan membuat penilaian ke atas kredibiliti kesemua saksi-saksi bagi pihak pendakwaan, Mahkamah mendapati dan memutuskan bahawa pihak pendakwaan telah berjaya membuktikan kes prima facie seperti mana pertuduhan. Dengan itu kedua-dua OKT dipanggil untuk membela diri.

F

[18] The trial was then continued by another trial judge as the previous trial judge was transferred out from High Court Taiping. In this regard, both the deputy public prosecutor and the defence counsel had no objection to the trial being continued and presided over by a new trial judge. They also indicated that no recalling of witnesses was to be made.

G

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THE DEFENCE

The first appellant

[19] The first appellant gave her evidence on oath. In essence, her defence was that she did not murder the victim or conspire with anybody to commit the murder. She was at the place of the incident to clean house No 19 upon request by the victim. During her lunch break, she went to see her boyfriend known as 'Raja' as Raja wanted to borrow her motorcycle. Raja then sent the first

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A appellant back to house No 19 to continue with her cleaning work and left the place. About ten minutes later, Raja returned to the house and asked for money from the first appellant. As the first appellant had no money to give Raja, she asked the victim whether the victim can give her money. The victim responded that she will give the money after the first appellant had completed the cleaning work.

B The first appellant then continued with her work whilst Raja assisted the victim to repair the faulty hose upstairs. Thereafter, the first appellant heard the victim shout and when the first appellant went upstairs, she saw Raja holding the victim and tying her hands. Raja also threatened the first appellant.

C [20] Raja then instructed the first appellant to take things from house No 2 which she acceded and took several items from the house including handphones, a handbag, and a CCTV decoder. Raja and the first appellant then left the place in the first appellant's motorcycle. They then proceeded to

D Raja's rented house at Taiping Garden.

E [21] The first appellant admitted that she told the police the whereabouts of the items in a blue plastic bag found at Taman Tekkah, Taiping but explained that the plastic bag and its contents were thrown by Raja at the place in the presence of the first appellant.

The second appellant defence

F [22] On the other hand, the second appellant gave an unsworn statement from the dock ('D1').

G [23] The second appellant denies committing the offence of murder of the victim. On 27 June 2016, the date of the incident, the second appellant did not even know the first appellant. The second appellant only knew the first appellant at end of June 2016 when she asked him to find a house for her to rent. The second appellant also denied that he was the man in the CCTV recordings and did not show the police any items confiscated by the police.

H *The decision of the trial judge at the end of the case*

I [24] Considering the evidence presented by the defence including the unsworn statement of the second appellant, and the totality of the evidence in this case, the trial judge found that both appellants have failed to raise a reasonable doubt on the prosecution case. As such, both the appellants were convicted for the offence of murder of the victim and were sentenced to a mandatory death sentence.

THE ISSUES RAISED BY THE APPELLANTS BEFORE THIS COURT **A**

[25] In challenging the decision of the trial judge, the appellants in their written and oral submissions raised the following issues before us:

- (a) common intention has not been established by the prosecution between the first and the second appellants to murder the victim; **B**
- (b) the principle of ‘last seen together’ was wrongly applied by the trial judge; **C**
- (c) the circumstantial evidence before the court was in favour of the first appellant; **D**
- (d) the first appellant owes no duty to save the victim at the material time; **E**
- (e) the trial judge erred in making material inferences and presumptions that were in favour of the prosecution and failed to give the benefit of the doubt to the first appellant. **F**
- (f) the trial judge erred in concluding that the prosecution has established its case on available circumstantial evidence; and **G**
- (g) the trial judge has failed to consider the unsworn statement of the second accused. **H**

THE ANALYSIS AND DECISION OF THIS COURT

[26] To begin with, it is pertinent for this court to analyse the evidence in totality in considering whether at the end of the prosecution case, a *prima facie* case had been established and at the end of the case the prosecution had proven its case beyond any reasonable doubt. **F**

[27] In the present case, to establish a *prima facie* case for an offence of murder punishable under s 302 of the Penal Code, the ingredients to be proved by the prosecution are the death of the victim, the victim died as a result of the injuries suffered, the injuries were caused by the appellants in furtherance of their common intention and the appellant’s act comes within one or a combination of the limbs under s 300 of the Penal Code. **G**

[28] For ease of reference, s 300 of the Penal Code provides:

Except in the cases hereinafter excepted, *culpable homicide is murder* —

- (a) if the act by which the death is caused is done with the intention of causing death; **I**
- (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

- A (c) *if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or*
- B (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid. (Emphasis added.)

C [29] The prosecution, in this case, is relying on cl (c) of s 300 of the Penal Code that the appellant intentionally caused bodily injuries to the deceased which is sufficient in the ordinary course of nature to cause death.

D [30] As regards this cl 300(c) of the Penal Code, it is trite that the prosecution has to prove firstly, that the appellant, intentionally caused the injury to the victim, and secondly, the injury caused is sufficient in the ordinary course of nature to cause death. The intention to cause death is not an ingredient to be proved for the application of cl 300(c) (see *Virsa Singh v State of Punjab* AIR 1958 465; *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 (FC)).

E [31] In a recent Federal Court case of *Zulkiplé bin Mohamad v Public Prosecutor* [2022] 1 MLJ 479; [2022] 1 CLJ 673, the elements to be proved for the application of cl (c) of s 300 was reiterated as follows:

F [28] The elements that the prosecution needs to prove in order to establish a case under cl (3) of s 300 of the Indian Penal Code, which corresponds with cl (c) of s 300 of our Penal Code, were spelt out by Vivian Bose J in *Virsa Singh* and they are as follows:

- G (i) it must be established that a bodily injury is present;
- (ii) the nature of the injury must be proved;
- H (iii) it must be proved that *there was an intention to inflict that particular bodily injury*, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended; and
- (iv) it must be proved that the injury of the type described, made up of the three elements set out above, *is sufficient to cause death in the ordinary course of nature*. (Emphasis added.)

I [32] The Federal Court in the same case explained extensively the burden to prove intention under cl (c) of s 300 and its application in the following manner:

[50] It follows that where the case falls under cl (c) of s 300 of the Penal Code, there is no requirement for the prosecution to prove intention to cause death under cl (a), or knowledge of the likelihood of death under cl (b) or knowledge of the imminent danger of the act under cl (d). *What the prosecution needs to prove in order to bring the*

case under cl (c) of s 300 is to show that the injury proved to be present was caused intentionally and not accidentally and that the injury was sufficient in the ordinary course of nature to cause death.

[51] We need to come back to *Virsa Singh* to hopefully clear the point beyond controversy. In that case, counsel for the appellant had in fact argued that the ‘intention’ that cl (c) of the Indian Penal Code requires must be related not only to the bodily injury inflicted but also to the clause ‘and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death’. The Supreme Court disagreed and the reason for its disagreement was this: This is a favourite argument in this kind of case but is fallacious. If there is an intention to inflict an injury that is sufficient to cause death in the ordinary course of nature, then the intention is to kill and in that event, the thirdly would be unnecessary because the act would fall under the first part of the section, namely:

If the act by which the death is caused is done with the intention of causing death.

[52] This exposition by the Supreme Court dispels any notion that under cl (c) of s 300 of the Penal Code, *the prosecution is required to prove that the bodily injury intended to be inflicted was intended to cause death in the ordinary course of nature. The only requirement under cl (c) is for the prosecution to prove that the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.*

[53] *The ‘intention’ or the mens rea element of murder under cl (c) of s 300 of the Penal Code must not be coalesced with the ‘intention’ or the mens rea element of murder under cl (a). Under cl (a), death is the intended consequence and death results as intended, whereas under cl (c), death is not the intended consequence but death results, not because death is intended but because the bodily injury intended to be inflicted is of a kind that is sufficient in the ordinary course of nature to cause death.* (Emphasis added.)

[33] Further, it is trite that the element of intention cannot be proved by direct evidence but could be inferred from the appellant’s act and the surrounding circumstances (see *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 (FC); *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10 (FC); *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265; [1994] 2 CLJ 151 (SC); *Mohd Shawal bin Abdullah v Pendakwa Raya* (Criminal Appeal No K-05(M)-160–04 of 2016) (unreported) (CA)).

[34] Reverting to the present case, we find the evidence led by the prosecution based on strong circumstantial evidence has proved that the second appellant had intentionally caused the injury to the deceased with the common intention of the first appellant, which in the ordinary course of nature would cause death. The evidence of the prosecution’s witnesses in particular PW10 and PW6, the CCTV recordings, and the seizure of the items belonging to PW8, PW10, and the victim shown by the first appellant at Taman Tekkah,

- A Taiping, and a T-shirt worn by the second appellant during the incident which was shown by the second appellant to the police proved this fact.

- B [35] Further, the pathologist in this case, PW6, testified that the cause of death was asphyxia due to smothering. In her evidence, PW6 explained that the act of closing the victim's nose and mouth simultaneously would cause asphyxia which causes death. In her evidence, this was said:

- C Pemeriksaan menunjukkan muka si mati terkongesi dan bengkak dengan bintik-bintik pendarahan. Beliau telah mengalami luka-luka lecet dan lebam di bahagian muka, kedua-dua lengan dan kaki. *Pada pendapat saya, kecederaan ini selaras dengan kecederaan akibat rongga hidung dan mulut ditutup (tekupan). Rongga hidung dan mulut boleh ditutup dengan tangan, kain, bantal dan lain-lain objek yang cukup besar untuk menutup kedu-dua serentak. Perbuatan ini sendiri boleh mengakibatkan si mati mengalami lemas udara ('asfiksia') dan akhirnya membawa kematiannya.* (Emphasis added.)

- D [36] In the circumstances, we agree that cl (c) of s 300 is applicable and in the present case the prosecution has succeeded in proving this clause to prove the offence of murder against the victim. Again, we are satisfied that the act that in the ordinary course of nature would cause death was inflicted by the second
- E appellant with the common intention of the first appellant.

- F [37] The other elements of the offence of murder as alluded to earlier were not in dispute and as such, we find that the decision of the trial judge in his finding that the prosecution has proved a prima facie case at the end of the prosecution case on maximum evaluation was correct and there is no reason to interfere in the findings of fact based on the credibility of prosecution's witnesses. Here, the trial judge is in a better position to make the findings of fact as the trial judge has the audio-video advantage over the witnesses.

- G (see *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; [2009] 3 CLJ 236 (FC); *Lee Ah Seng & Anor v Public Prosecutor* [2007] 6 MLJ 1; [2007] 5 CLJ 1 (FC)).

- H [38] Next, regarding the appellants' defence, the trial judge comprehensively analysed the defence as reflected in the grounds of judgment. As regards the first appellant's defence, essentially, the first appellant denied committing the offence and shifted the blame to a person known as Raja. The character of Raja was never raised during the investigation or at the prosecution stage. It was only
- I raised at the defence stage. In the circumstances, the trial judge is entitled to make a finding that the defence is an afterthought (see *Teng Howe Seng v Public Prosecutor* [2009] 3 MLJ 46; *Alcontara all Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 75).

The first appellant's subsequent conduct as mentioned earlier, was found not in her favour by the trial judge. Thus, we agree with the trial judge that the defence of the first appellant has not raised any reasonable doubt.

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[39] Reverting to the second appellant, a complete denial of involvement with the offence was advanced by the defence. However, this is also against the weight of strong circumstantial evidence established by the prosecution including the second appellant's conduct in showing the police the T-shirt that he wore during the incident.

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[40] Moreover, the second appellant gave an unsworn statement that was not subject to cross-examination by the prosecution or being questioned by the trial judge. The weight to be attached to the evidence is lesser than the evidence given under oath. The assessment of an unsworn statement has been lucidly explained by the Federal Court in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2014] 3 MLJ 774; [2015] 2 CLJ 145 in the following manner:

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[202] We accept that the courts below did not explicitly consider the political conspiracy defence which was raised by the appellant in his unsworn statement from the dock. *In law, a trial judge will not give much weight to what an accused has said in his unsworn statement as he is not subject to cross-examination by the prosecution nor can he be questioned by the trial judge.* (*Lee Boon Gan v Regina* [1954] 1 MLJ 103; [1954] 1 LNS 39; *Udayar Alagan & Ors v Public Prosecutor* [1962] 1 MLJ 39; [1961] 1 LNS 146; *Mohamed Salleh v Public Prosecutor* [1968] 1 LNS 80; [1969] 1 MLJ 104; *Juraيمي Husin v Public Prosecutor* [1998] 1 MLJ 537; [1998] 2 CLJ 383).

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[203] The issue is did the trial judge and the Court of Appeal adopt the correct principle in assessing the appellant's statement? The trial judge in assessing the appellant's statement observed as follows:

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[196] The accused in this case had denied sodomising the complainant. Although this denial was made from the dock, it was still a denial. He believed the charges against him was made not because the sodomy took place, but to send him into political oblivion by attempting to put him behind bars.

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[204] The Court of Appeal after discussing the law on a statement from the dock, agreed with the trial judge that the appellant's statement from the dock was a mere denial. The Court of Appeal observed as follows:

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[108] *For the respondent to succeed in his defence, it is incumbent upon him to adduce evidence which can answer the allegations in the charge.* In this case, the respondent did not even deny that he was at the scene of the crime at the material time and date as stated in the charge. He never disputed that his car was seen entering and leaving the condominium at the material time. He also did not dispute that he was seen entering the lift to the 5th floor of the condominium and later leaving the place. He also did not dispute that he had directed his chief of staff, PW24 to arrange for an envelope to be handed over to him at the said condominium and that PW24 had instructed PW1 to bring the envelope to him. The respondent also did not dispute the fact that PW1 had brought the

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- A envelope to him at the place of the incident. The learned judge found that the respondent's statement from the dock is a mere denial with which we fully agree. The bare denial by the respondent does not amount to any doubt whatsoever. *A credible defence is one that answers the evidence thrown at it by the prosecution. It is also imperative that the respondent explain his case.*
- B [205] We hold that the Court of Appeal had adopted the right principle in assessing the appellant's statement from the dock. (Emphasis added.)
- C [41] Reverting to the present case, we agree with the trial judge that the second appellant's defence was a mere denial. The defence did not answer the prosecution case, including the second appellant depicted in the CCTV recording wearing the same T-shirt that the second appellant showed to the police in the rented house in Sungai Petani.
- D [42] In the circumstances, we find that the trial judge correctly evaluated the defence of the second appellant and found that the defence has also failed to raise any reasonable doubt.
- E [43] Now, we move to the issues raised by the appellants in this appeal before us.
- The issue of common intention between the first and second appellants to murder the victim*
- F [44] Counsel for the second appellant submitted that the trial judge has failed to ascertain in his grounds of judgment when the common intention between the appellants arose to murder the victim. The common intention, if any, was only to rob the victim's house. It was submitted that there was no
- G common intention between the appellants to murder the victim.
- [45] Section 34 of the Penal Code provides:
- 34 When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the
- H act were done by him alone.
- I [46] It is a trite principle of law that common intention may be inferred from the circumstances of the case and it is not incumbent upon the prosecution to prove that all the accused have the common intention to murder the victim. If it is established that all the accused have a common intention to commit a criminal act that resulted in the commission of the offence of murder, common intention can operate against all the accused for the murder. What is pertinent is the participation in the criminal act.

[47] The Federal Court in *Farose bin Tamure Mohamad Khan v Public Prosecutor and other appeals* [2016] 6 MLJ 277; [2016] 9 CLJ 769 has explained this principle of law as follows:

[65] With respect, we are also not persuaded by the two Singapore Court of Appeal authorities cited and argued before us. Despite the lengthy explanation on the issue of common intention in particular in *Daniel Vijay*, we still hold the view which had been widely accepted by our courts that in a criminal prosecution where s 34 of the Penal Code is invoked, it is not incumbent on the prosecution to prove that there existed between the participants a common intention to commit the crime actually committed. As long as there is a common intention to commit a criminal act, which resulted in the commission of a crime actually committed, s 34 can operate against all persons involved in the commission of the actual crime.

[66] The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. Direct evidence as proof is difficult to procure because the common intention is essentially a state of mind. Invariably inferences have to rely upon arising from such acts or conduct of the accused, the manner in which the accused arrived at the scene, the nature of injury caused by one or some of them, or such other relevant circumstances available. *The totality of the circumstances must be taken into consideration in arriving at a conclusion whether there is a common intention to commit the offence for which the accused could be convicted. The facts and circumstances of each case might vary. As such, each case should be decided based on the facts involved.* (Emphasis added.)

[48] The argument that there was only a common intention to commit robbery and not murder had been raised in several cases before and has been answered by the apex court including in *Farose's case* and *Low Kian Boon & Anor v Public Prosecutor* [2010] 4 MLJ 425; [2010] 5 CLJ 489. In *Low Kian Boon's* case, all the accused were convicted of murder in furtherance of their common intention although it was argued that their intention was only to rob but resulted in the death of the victim.

[49] The Federal Court in *Low Kian Boon's* case explained the position of law in the following words:

[66] The Privy Council in *Mahbub Shah v Emperor* AIR [1945] PC 118 considered the term 'common intention' as distinguished from 'same intention'. If the person, party to prior planning is not present to participate in the action, his case cannot be covered under s 34 of the Penal Code. In *Sereekanlal Ramayya Munipalli v State of Bombay* AIR [1955] SC 287, the Supreme Court stated: Lord Sumner's expressed in the Miltonic verse: 'They also serve who only stand and wait' a fortiori embraces cases of common intention, instantly formed triggering a plurality of persons into an adventure in criminality, some hitting, some missing, some splitting hostile needs, some spilling drops of blood. Guilt goes with community of intent coupled with participatory presence or cooperation. No piny justice niceties can be pressed into service to nullify or jettison the plain punitive purpose of Penal Code.

A [67] *After having given consideration to the elucidatory interpretation given to the words in s 34 we are in agreement with the determination pointedly made by the COA where it is pronounced that:*

B On the facts and circumstances of the present case, *we are satisfied as indeed the learned trial judge was that the first and 4th accused committed the offence of murder with common intention. Their joint presence at the scene and their participation to be inferred from the injuries inflicted on the deceased coupled with their flight from the scene reasonably support the existence of a common intention.* We are conscious that there authorities which state that mere flight or absconding from the scene of the crime is insufficient to infer guilty intention. But if you look all those cases

C you will find that in each of them, flight was the only circumstance relied upon. That is not so in the present case. There are other facts and circumstances which must be taken together with the flight of both accused from the scene of the crime. (Emphasis added.)

D [50] In *Ferose's* case, the Federal Court accepted the principle of law in *Low Kian Boon's* case by quoting the relevant reasoning in that case which is as follows:

E [67] In *Low Kian Boon & Anor v Public Prosecutor* [2010] 4 MLJ 425; [2010] 5 CLJ 489 (*Low Kian Boon*) in considering the scope of s 34 of the Penal Code, this court traced the origin of the said provision to the Indian Penal Code. This court in *Low Kian Boon* said that:

F It is not without significance that the original draft of the Indian Penal Code did not contain the phrase 'in furtherance of the common intention of all'. The words were inserted by s 1 of Act xxvii of 1870 (India). When the Indian Penal Code was introduced into the Straits Settlements in 1872 and the Federated and the Unfederated Malay States, the section as amended was also received. Section 33 states that the word 'act' denotes a series of acts as well as a single act; and the word 'omission' denotes a series of omissions as well as a single omission. *It follows that the words in s 34 'when a criminal act is done by several persons' may be construed to mean 'when criminal acts are done by several persons'. Thus, where different acts in a criminal enterprise are committed by different participants, such participants may still be regarded as having done 'a criminal act' for the purposes of liability under s 34. The raison d'être, as it were, of s 34 was to meet the situation where it may be difficult, if not impossible, to distinguish between the acts of each individual member of a party or to prove precisely what part was played by each of them. Section 34 operates to impute liability to a participant whose participation contributed to the result, though he cannot be proved to have committed the actus reus himself...*

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I [68] The issue as to whether under s 34 of the Penal Code, there must exist a common intention to commit the crime actually committed as decided in the case of *Rex v Vincent Banka & Anor* [1936] 1 MLJ 53; [1936] 1 LNS 62 was considered by this court in *Low Kian Boon*. This court in *Low Kian Boon* said:

In *Vincent Banka*, *the two appellants were charged with committing robbery and murder in the course of robbery.* Evidence was inconclusive as to which of the two

appellants had carried the knife or inflicted the fatal wound. They were convicted on both charges and appealed against their convictions for murder. The appeal was allowed, Huggard CJ said at p 69:

It follows that it is the duty of the trial judge, in cases where s 34 of the Penal Code is relied on, to direct the attention of the jury to any evidence from which they may legitimately infer the existence of a common intention to commit the criminal act actually committed; at the same time making it clear that the question whether or not such common intention existed is a question of fact and is for them to determine.

And at p 70:

... under the terms of that section (ie s 34 of the Penal Code) as has already been pointed out, there must exist a common intention to commit the crime actually committed, and it is not sufficient that there should be merely a common intention to 'behave criminally'.

It was clear that the two appellants had set out to commit robbery. Regarding the murder, however, evidence was inconclusive as to who had carried the knife or inflicted the fatal wound. Applying the test enunciated by Huggard CJ, the court held that there must be evidence that there was a common intention between the robbers not merely to commit robbery but also, if necessary, to kill the deceased. *Since there was no evidence of any express agreement between the appellants that a knife should be carried or that the victim should be stabbed, the court convicted them only of robbery and acquitted them of murder.*

[69] *To demonstrate the fallacy in the aforesaid reasoning in Vincent Banka, this court in Low Kian Boon referred to the judgment of Lord Sumner in the leading authority of the Privy Council in Barendra Kumar Ghosh v King Emperor AIR 1925 PC 1: ...*

The fallacy in this kind of reasoning was demonstrated by Lord Sumner in *Barendra Kumar Ghosh v Emperor*, the leading Indian authority. The facts were that the appellant, together with a few others, had gone to a Post Office in Bengal to demand money from the sub-postmaster. All of them fired at the sub-postmaster with their pistols. He was hit in two places and died almost instantly. The appellant was arrested after the others fled. The trial judge directed the jury that the appellant might be the man who fired the fatal shot and that if the jury were satisfied that the subpostmaster had been killed in furtherance of the common intention of all, the appellant was guilty of murder whether he fired the fatal shot or not. The appellant was convicted of murder by the jury. Lord Sumner said at pp 5–6 and 9 of the report:

The appellant's argument is, in brief, that in s 34, 'a criminal act', insofar as murder is concerned, means an act which takes life criminally within s 302, because the section concludes by saying 'is liable for that act in the same manner as if the act were done by himself alone', and there is no act done by himself alone, which could make a man liable to be punished as a murderer, except an act done by himself and fatal to his victim.

Thus, the effect is that, where each of several persons does something criminal, all acting in furtherance of a common intention, each is punishable for what he has done as if he had done it by himself. Such a proposition was not worth

- A enacting, for, *if a man has done something criminal in itself, he must be punishable for it, and nonetheless so that others were doing other criminal acts of their own at the same time and in furtherance of an intention common at all ...*
- B [70] Simply put, *common intention is concerned with the principle of joint liability in penal law*. This principle has been set out in numerous judgments in our jurisdiction. In *Krishna Rao*, the appellants were charged with the murder of four persons in the course of the robbery of a jewelry shop
- C [71] *The decision of the High Court was affirmed by the Court of Appeal and the Federal Court. The Federal Court approved the trial judge's application of the legal principle relating to s 34 of the Penal Code (See Krishna Rao all Gurumurthi v Public Prosecutor and another appeal [2009] 3 MLJ 643; [2009] 2 CLJ 603). The Federal Court held that having regard to all the circumstances of the case, the theft or burglary or robbery and the murders were an integral part of one and the same transaction. Put differently, the Federal Court held that this was not a case of a mere recovery of recently stolen property from an accused person. There were several other cogent pieces of circumstantial evidence which go to establish beyond a reasonable doubt that the first and second appellants, in that case, participated in the commission of the murders in the context of s 302 being read with s 34 of the Penal Code. (Emphasis added.)*
- E [51] In the present case, based on the evidence adduced, the inference of common intention can be drawn from, inter alia, the following facts:
- F (a) the first appellant was at houses No 2 and 19 at the material time;
- (b) the first appellant brought the second appellant on her motorcycle;
- G (c) the victim entered house No 19 and later the first and the second appellants entered the house;
- (d) the first appellant was then seen in CCTV recording entering house No 2;
- H (e) the first appellant's conduct to unplug the CCTV decoder from house No 2 and took it away and throwing it at Taman Tekkah with other looted items.
- (f) the first and second appellant left the place of incident on the first appellant's motorcycle and the victim was then nowhere to be seen in the CCTV recordings;
- (g) shortly after, PW10 found the victim motionless at house No 19 with her mouth, hands, and legs tight with cellophane tape;
- I (h) both the appellants were arrested in the second appellant's rented house in Sungai Petani;
- (i) the first appellant showed the police the items taken from house No 2 in a blue plastic bag at Taman Tekkah; and

- (j) the second appellant showed the police the T-shirt that he wore at the time of the incident in the house at Sungai Petani. A

[52] Based on the totality of the evidence before the court and the circumstances of this case, we find there was a common intention by the appellants which resulted in the death of the victim. This attracts the offence of murder by both the appellants punishable under s 302 of the Penal Code Act 574 discussed earlier. B

[53] On the same issue, although at the end of the prosecution case, the trial judge did not state whether the common intention has been established, the law is trite that at the appeal stage before us, we may review the evidence and determine whether common intention has been proven. This has also been explained by the Federal Court in *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579 where the Federal Court opined as follows: C D

[102] *we hold the view that even if the trial judge had failed to mention of any evaluation of common intention in his written grounds of judgment, the Court of Appeal, which in law reheard the case when exercising its appellate function, was empowered and also duty bound to carry out an evaluation exercise to determine whether common intention did exist.* Here the Court of Appeal equally failed to do that. An appeal is a continuation of proceedings by way of rehearing and an appeal court may subject the evidence to a critical re-examination (*Ahmad Najib Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800 *Mohamad Deraman v Public Prosecutor* [2011] 3 MLJ 289; [2011] 3 CLJ 601). (Emphasis added.) E F

[54] In the circumstances, the contention that there was no common intention to murder by both the appellants, we find, is bereft of any merit.

The issue of 'last seen together' G

[55] Next, counsel for the first appellant contended that the doctrine of 'last seen together' is not applicable against the first appellant as she was present at the place of the incident upon the request of the victim to clean house No 19. Thus, the first appellant was expected to be with the victim and conclusion cannot be made that she was the one who involved in the murder of the victim. H

[56] On this issue, the evidential value of 'last seen together' is, inter alia, to show that there was an opportunity for the person last seen with the victim to commit the offence against the victim. It is corroborative in nature which corroborates the other evidence presented by the prosecution. Consequently, the last person with the accused has to explain his presence with the victim at the material time. This theory or doctrine of last seen together is applicable I

A especially when the time gap between the accused and the victim were last seen alive was very short which could exclude another person from committing the offence against the victim.

B [57] *Sarkar Law of Evidence* (18th Ed, Vol 1) at p 140, states this:

C *The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.* It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and the possibility of other persons coming in between exist. In absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. The circumstance of last seen together does not by itself and necessarily lead to the inference that the accused who committed the offence ... (Emphasis added.)

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[58] In a recent case of *Salem ak Brayon v Public Prosecutor* [2023] 1 MLJ 441; [2022] 1 LNS 2917, this court had the opportunity to deal with the same issue and explained as follows:

E [53] Our attention was drawn to the Indian Supreme Court decision of *Ashok v State of Maharashtra* [2015] 4 Supreme Court 393 where the Supreme Court of India held that:

F The 'last seen together' theory has been elucidated by this court in *Trimukh Marotiu Kirkan v State of Maharashtra* [2006] 10 SCC 106, in the following words:

G *Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer an explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. Thus, the doctrine of last seen together shifts the burden of proof on the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him.*

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I [54] Under the circumstances of this case where, in our view, the 'last seen together' theory applies, the burden shifted to the appellant to proffer a strong and cogent explanation and rebut the presumption that his act or series of acts led to the deceased's death and the inference that he committed the acts. The absence of such an explanation would be detrimental to his defence (see *Nika Ram v State of HP* [1972] 2 SCC 80 *Kanhaiya Lal v State of Rajasthan* [2014] 4 SCC 715). (Emphasis added.)

[59] Reverting to the present case, the evidence of 'last seen together' is not the only evidence presented by the prosecution. There is ample other evidence produced before the court as alluded to earlier, to show the first appellant's common intention with the second appellant's in the offence of murder against the victim. This is reflected in the trial judge's grounds of judgment which, inter alia states:

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[63] To conclude, it was evident that the first accused, Kagatree had committed the crime by participating in it based on the evidence from the CCTV recording, she was the last person markedly seen to be with the deceased. Furthermore, the loot was found in her presence and she was the one who gave directions to where the other stolen items were thrown away ...

C

[60] Further, the time gap between the appellants' last seen with the victim alive is only a short while before PW10 found the victim motionless in house No 19. we find the trial judge was not wrong in applying the doctrine of 'last seen together' against the appellants.

D

THE ISSUE OF CIRCUMSTANTIAL EVIDENCE

[61] Counsel for the second appellant then submitted that there was insufficient circumstantial evidence in this case and the trial judge erred in his finding that the prosecution has proved its case based on the circumstantial evidence. It was contended that there was no proof that the second appellant was present at the place of the incident, the second appellant's fingerprint or DNA was not found at the scene of the crime, the seizure of the second appellant's T-shirt shown by him to the police is insufficient proof that he was at the scene of the crime, and the seizures of the items stolen in house No 2 does not prove that the second appellant was involved in the murder of the victim.

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[62] On the other hand, counsel for the first appellant submitted that the available circumstantial evidence in this case, is in favour of the first appellant. The reasons for this contention are that the CCTV recordings show that the first appellant was helping the victim to clean house No 19, the CCTV recordings also show that her conduct robbing house No 2 after being threatened by her male friend, the looted items only show that there was no pre-planned or pre-meditated to rob house No 2, no fingerprint or DNA of the first appellant that implicates her with the crime, and the first appellant did not manhandle the victim in the house.

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[63] Here, it is trite law that where the prosecution is relying on circumstantial evidence to prove its case, the circumstantial evidence must irresistibly point to one and only one conclusion which is the guilt of the accused and in this case both the appellants (see *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 (FC)).

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A [64] On this issue of circumstantial evidence, it is also useful to refresh our memory on the trite principle of law enunciated by our apex courts and one of which is by the Federal Court in the *Low Kian Boon* case where this was said:

[55] In *Udaipal Singh v State of Uttar Pradesh* AIR [1972] SC 54; [1972] 4 SCC 142, the Supreme Court observed:

B (xxi) In cases where only circumstantial evidence is available at the outset one normally starts looking for *motive and the opportunity to commit the crime*. If the evidence shows that the accused having a strong enough motive had the opportunity of committing the crime and the established circumstances on the record considered along with explanation, if any, of the accused exclude the reasonable possibility of any-one else being the real culprit then the chain of evidence can be considered to be so complete so as to show that within all human probability, the crime must have been committed by the accused. *He may in that event, safely be held guilty on such circumstantial evidence.*

D [56] With the rejection of the existence of Ivan the circumstances in this appeal merit a reflection of the words of Fazal Ali J in delivering the judgment in *Ram Avtar v The State (Delhi Administration)* AIR [1985] SC 1692:

E At the very outset we might mention that *circumstantial evidence must be complete and conclusive before accused can be convicted thereon. This, however, does not mean that there is any particular or special method of proof of circumstantial evidence*. We must, however, guard against the danger of not considering circumstantial evidence in its proper perspective, eg, where there is a chain of circumstances linked up with one another, it is not possible for the court to truncate and break the chain of circumstances. *In other words where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated*. The learned Sessions judge seems to have fallen into this very error. In the instant case, instead of taking all the circumstances together, which are undoubtedly circumstantial and closely linked up with one another, the learned Sessions judge has completely misdirected himself by separately dealing with each circumstance thereby making a wrong approach while appreciating the circumstantial evidence produced in the case.

G ... It is not possible for us to consider the various chains of circumstances, mentioned above, in isolation by divorcing them from the other circumstances which are closely interlinked with them ...

H Before concluding we might observe that where circumstantial evidence consists of a chain of continuous circumstances linked up with one another, the court has to take the cumulative effect of the entire evidence led by the prosecution before acquitting or convicting an accused. (Emphasis added.)

I [57] With regard to the question of proof mention could be made of the judicial decision in *Public Prosecutor v Wong Wai Hung & Anor* [1993] 1 SLR 927, Rubin JC stated, inter alia:

It is trite law that when the prosecution relies wholly on circumstantial evidence, the quantum of proof must be more than mere skeletons. The first and foremost

principle to be borne in mind when approaching circumstantial evidence is set out in *Idris v Public Prosecutor* [1960] 1 MLJ 296 at p 297 (where Hill Ag CJ quoted with approval the trial judge's summing up to the jury and his quotation of the words of Lord Cairns in *Belhaven & Stenton Peerage* [1875–6] LR 1 App Cas 278 at 279):

... in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.

In other words, *circumstantial evidence consists of this: that when you look at all the surrounding circumstances, you find such a series of undersigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps then it is of no use at all. As I have stated this case depends entirely upon circumstantial evidence.* (Emphasis added.)

[65] In the present case, there is ample circumstantial evidence tendered in court by the prosecution where its cumulative effect had established a case against the appellants beyond a reasonable doubt. The evidence of CCTV recordings, incriminating items discovered in consequence of information from the appellants, the conduct of the appellants, the appellants were last seen with the victim and were arrested together at a house in Sungai Petani were among the strong circumstantial evidence that pointed to the guilt of both the appellants.

[66] The DNA and fingerprint evidence are only corroborative evidence and its absence would not affect the prosecution's case if there is other evidence to establish its case as in the present case. We also do not find that the available circumstantial evidence is in favour of the first appellant's innocence as contended by counsel for the first appellant based on the reasons mentioned earlier.

[67] As such, we agree with the trial judge that the circumstantial evidence in this case, has proved the case for the prosecution against the appellants, and therefore, the appellants' contention on this issue is untenable.

The issue that the first appellant has no duty to save the victim

[68] As regards this issue, counsel for the first appellant submitted that the first appellant did not owe any legal duty to save the victim. It was argued that

- A the first appellant's omission to save the victim and to report the incident to the police does not make her criminally liable for the robbery and murder of the victim.
- B [69] On this issue, the charge against the appellants was for the offence of murder with the common intention of both of them. What is important is the prosecution has established its case against both appellants based on the strong circumstantial evidence as discussed earlier. The omission to report to the police or take any action to save the victim would only add another piece of circumstantial evidence against the first appellant as that would be the reasonable action to be taken unless the first appellant participated in the said offence as proven in this case.
- C
- D [70] Therefore, the issue raised by the first appellant does not have any material weight that affects the prosecution's case.
The issue that trial judge erred in making material inferences and presumptions that were in favour of the prosecution and failed to give the benefit of the doubt to the first appellant
- E [71] Here, counsel for the first appellant submitted that the trial judge had wrongly drawn many material inferences and presumptions favourable to the prosecution while neglecting the benefit of the doubt to the accused.
- F [72] The favourable inferences to the prosecution made by the trial judge are the first appellant unplugged the CCTV decoder from house No 2 and took it away, the tight tying of the victim is to prevent her from freeing herself and shouting for help, the seizure of the same motorcycle in Sungai Petani that was used in the incident and the place of seizure was the place both the appellants were cohabiting, the story of faulty hose and the first appellant was living at Taiping Garden were not advanced at the prosecution's case, the first appellant facilitated the murder and the first appellant cannot be cohabiting with the second appellant without knowing him for some time.
- G
- H [73] Having considered the evidence in totality, we are of the view that the inferences made by the trial judge were reasonable and logical. The inferences were made based on the proven facts in this case.
- I [74] In this regard, it is also useful to refer to the Federal Court case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 which states as follows:
[12] After the amendments to ss 173(f) and 180 of the CPC, the statutory test has been altered. What is required of a Subordinate Court and the High Court under the amended sections is to call for the defence when it is satisfied that a prima facie

case has been made out at the close of the prosecution case. *This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter upon his or her defence. It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. Thus, if the prosecution evidence admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused.* See, *Tai Chai Keh v Public Prosecutor* [1948–49] MLJ Supp 105; *Public Prosecutor v Kasmin bin Soeb* [1974] 1 MLJ 230 ... (Emphasis added.)

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[75] Likewise in the present case, based on the evidence before the court, the trial judge has made inferences that were in favour of the prosecution. There were no two or more inferences that can reasonably be made from the proven facts in this case and as such, the inferences in favour of the first appellant do not arise.

C

The issue that the trial judge has failed to consider the unsworn statement of the second accused

D

[76] After having read the grounds of judgment of the trial judge, we find that the contention of the counsel for the second appellant was without basis. The trial judge did consider the unsworn statement of the second appellant in sufficient detail. In the grounds of judgment, it states, inter alia, as follows:

E

Defence of Murugan

Murugan, the second accused, states from the dock in his written unsworn statement that he does not know the first accused, Kagatree at all, he is not associated with her at all and he is not involved in the commission of the crime.

F

He states further that he was not present at the scene of the crime, as he was all the while at Sungai Petani, wandering around to look for a job. In effect, he is raising the defence of alibi, albeit without a notice under s 402A of the CPC.

G

His defence of alibi goes hand in hand with the defence of Kagatree, that it was not Murugan who had entered house No 19 and manhandled the deceased victim but Raja. This defence advanced by Murugan, is also an afterthought and a recent invention, as it was not advanced during the case of the prosecution, via SP16.

H

...

[68] *Having considered the whole evidence adduced, including the unsworn statement from the dock by the second accused*, am satisfied that in view of the concocted story by both the accused persons, in order to exonerate and exculpate themselves from criminal liability juxtaposed with the credible evidence of the prosecution, which stays intact, the defence is unworthy of any credence. Further, the defence has failed to raise any reasonable doubt as to the truth of the prosecution case or as to the accused persons' guilt for the reasons that I have considered earlier ... (Emphasis added.)

I

A CONCLUSION

[77] Based on the aforesaid reasons, we unanimously find that the conviction of both appellants on the charge of murder punishable under s 302 of the Penal Code is safe. Hence, the appellants' appeal is dismissed and the conviction and sentence by the High Court are affirmed.

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Appeal dismissed.

C Reported by Nabilah Syahida Abdullah Salleh

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TAB A1

[2014] 5 MLJ

Rajamorgan a/l Marimuthu v Public Prosecutor
(Zawawi Salleh JCA)

565

A

Rajamorgan a/l Marimuthu v Public Prosecutor

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
B-05-282-10 OF 2011
ABDUL MALIK ISHAK, AZAHAR MOHAMED AND ZAWAWI
SALLEH JJCA
25 APRIL 2014

C

*Criminal Procedure — Appeal — Appeal against conviction and sentence
— Appeal against decision of High Court — Accused person convicted for charge
of murder of child deceased — Sentenced to death — Prosecution's case and
conviction of High Court based on circumstantial evidence — Whether there was
direct evidence implicating accused in alleged murder of deceased — Whether
conviction and sentence safe — Penal Code s 302*

D

E

One Thilagavathy ('SP9') had arranged for the appellant's wife to babysit her son ('the deceased'). As the deceased refused to go to the appellant and his wife, SP9 then sent the deceased to one Kavitha's ('SP8') house to be babysat by one Sathayee ('SP7'). SP9 had told the appellant's wife to check on the deceased as he might be uncomfortable at a stranger's house. The appellant came and took the deceased away. According to SP7, the deceased was seen crying and refused to follow the appellant. SP7 tried to prevent the appellant from taking the deceased away but the appellant told her that he only intended to give him some chocolates and would return him later. When the appellant returned to SP7's house later, the child was seen to be weak and suffered breathing difficulty. The deceased was rushed to the clinic and the appellant and his wife tagged along. Unfortunately, the deceased had died when he was taken to receive treatment at the clinic. In the High Court, the appellant was convicted under s 302 of the Penal Code for the offence of murder and was sentenced to death. Hence, the present appeal against the conviction and sentence of the High Court. The appellant argued that the charge against him was only on the basis of circumstantial evidence and there was no direct evidence implicating the appellant in the alleged murder of the deceased; there was the DNA of a male person found in the nail clipping of the deceased but this was not explained by the prosecution; and that the abdominal and scrotal injuries was consistent with it being caused by a woman's nails but this was unexplained as well.

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Held, allowing the appeal and setting aside the conviction and sentence:

- (1) The fact that the appellant was last seen with the deceased may have created suspicions of his guilt, but not enough to prove the case against

- him beyond reasonable doubt. Last seen evidence would not by itself necessarily lead to an irresistible inference that the appellant committed the crime unless the same was duly supported by other links in the chain of circumstances evidence unerringly pointing out the guilt of the appellant. It should also be noted that the last seen evidence would only be a relevant evidence to complete the chain of circumstantial evidence. However the conviction could not be solely based on this piece of evidence (see para 27). A
- (2) The prosecution failed to establish by positive evidence any motive on the part of the appellant to murder the deceased. It was fairly well-settled that while motive did not have a major role to play in cases based on eyewitness account of the incident, it assumed importance in cases that rested entirely on circumstances evidence (see para 28). B
- (3) Absence of motive in this case was clearly a matter to be taken into account by the court. In so far as motive is concerned, SP9's evidence was much in favour of the appellant. She said that the appellant and his wife were very fond of the deceased and had expressed their desire to adopt the deceased. SP9 also stated that there were instances in which the appellant had helped her to send the deceased to seek medical treatment at the local clinic. The fact that he rushed the deceased to the clinic would neutralise any suggestion that he personally want the deceased dead (see para 28). C
- (4) It was the prosecution's contention that the appellant allegedly stomped on the deceased. However, there was no evidence of the appellant's footprints on the deceased's clothing. The police also did not retrieve any soil or bitumen from the crime scene to connect or implicate the appellant (see para 29). D
- (5) The prosecution's case was hampered with the existence of the DNA belonging to the 'unknown female' found in the deceased's fingernail clippings. There was no attempt by the prosecution to explain the presence of the female DNA profile. The circumstantial evidence relied upon by the prosecution coupled with the presence of female DNA profile, gave rise to a reasonable inference that the appellant might not be the perpetrator and a female could have injured the deceased. Furthermore, at any rate the chain of circumstantial evidence in this case was not so complete as to lead to the hypothesis of guilt of the appellant (see para 30–32). E

[Bahasa Malaysia summary

Seorang yang bernama Thilagavathy ('SP9') telah mengatur agar isteri perayu untuk menjaga anak lelakiinya ('si mati'). Oleh kerana si mati enggan dihantar kepada perayu dan isterinya, SP9 kemudiannya menghantar si mati ke rumah Kavitha ('SP8') untuk dijaga oleh seorang yang bernama Sathayee ('SP7'). SP9 telah memberitahu isteri perayu untuk memeriksa si mati kerana F

- A dia mungkin tidak selesa berada di rumah orang asing. Perayu datang dan membawa si mati. Mengikut SP7, si mati dilihat menangis dan enggan mengikut perayu. SP7 cuba menghalang perayu daripada membawa si mati pergi tetapi perayu memberitahunya yang dia hanya berniat untuk memberi si mati coklat dan akan mengembalikan si mati kemudian. Apabila perayu
- B pulang ke rumah SP7 kemudiannya, kanak-kanak tersebut dilihat lemah dan mengalami kesusahan untuk bernafas. Si mati kemudiannya dikejarkan ke klinik dan perayu dan isterinya ikut bersama. Malangnya, si mati telah meninggal dunia semasa dia dibawa ke klinik untuk menerima rawatan. Di
- C Mahkamah Tinggi, perayu disabitkan di bawah s 302 Kanun Keseksaan untuk kesalahan membunuh dan dijatuhkan hukuman mati. Maka, rayuan ini terhadap sabitan dan hukuman Mahkamah Tinggi. Perayu berhujah bahawa tuduhan terhadapnya hanya berdasarkan keterangan keadaan dan tidak terdapat keterangan terus yang membabitkan perayu dalam pembunuhan si
- D mati yang didakwa tersebut; terdapat DNA seorang lelaki yang didapati di dalam keratan kuku si mati tetapi ini tidak dijelaskan oleh pihak pendakwaan; dan bahawa kecederaan perut dan kemaluannya adalah konsisten dengan ianya diceritakan oleh kuku perempuan tetapi ini juga tidak dijelaskan.
- E **Diputuskan**, membenarkan rayuan dan mengenenpikan sabitan dan hukuman:
- (1) Fakta bahawa perayu yang dilihat kali terakhir bersama si mati mungkin membentuk rasa syak kebersalahannya, tetapi tidak mencukupi untuk membuktikan kes terhadapnya melampaui keraguan munasabah. Keterangan dilihat pada kali terakhir tidak dengan sendirinya membawa
- F kepada inferens tidak dapat ditahan bahawa perayu melakukan jenayah tersebut kecuali ianya disokong oleh penghubung lain dalam rantaian keterangan keadaan secara silap menunjukkan kebersalahan perayu. Ia juga patut diambil kira bahawa keterangan dilihat pada kali terakhir hanya akan menjadi keterangan relevan untuk melengkapi rantaian
- G keterangan keadaan. Walau bagaimanapun sabitan tidak boleh didasarkan semata-mata atas keterangan ini (lihat perenggan 27).
- (2) Pihak pendakwaan gagal untuk membuktikan dengan keterangan positif apa-apa motif oleh pihak perayu untuk membunuh si mati. Adalah ditetapkan dengan adil bahawa sementara motif tidak mempunyai
- H peranan penting dalam kes-kes berdasarkan keterangan saksi mengenai kejadian, ia memegang kepentingan dalam kes-kes yang bersandarkan keseluruhannya ke atas keterangan ikut keadaan (lihat perenggan 28).
- (3) Ketiadaan motif dalam kes ini jelas perkara yang perlu diambil kira oleh
- I mahkamah. Setakat motif, keterangan SP9 lebih memihak perayu. Dia menyatakan yang perayu dan isterinya tersangat sayang kepada si mati dan telah menyatakan keinginan mereka untuk mengambil si mati sebagai anak angkat. SP9 juga menyatakan bahawa terdapat keadaan di mana perayu membantu dia menghantar si mati untuk mendapatkan

rawatan perubatan di klinik tempatan. Fakta bahawa dia mengejar si mati ke klinik akan meneutralkan apa-apa cadangan bahawa perayu secara peribadi mengkehendaki si mati mati (lihat perenggan 28).

- (4) Adalah hujahan pihak pendakwaan bahawa perayu menghentakkan kakinya ke atas si mati. Walau bagaimanapun, tidak terdapat keterangan mengenai tapak kaki perayu ke atas baju si mati. Polis juga tidak memperoleh apa-apa tanah atau bitumen daripada tempat kejadian jenayah untuk mengaitkan atau membabitkan perayu (lihat perenggan 29).

- (5) Kes pihak pendakwaan telah dihalang dengan kewujudan DNA milik 'unknown female' yang didapati di dalam keratan kuku jari si mati. Tidak terdapat percubaan oleh pihak pendakwaan untuk menjelaskan kehadiran profil DNA perempuan tersebut. Keterangan ikut keadaan yang diguna oleh pihak pendakwaan bersama dengan kehadiran profil DNA perempuan tersebut, membangkitkan kepada inferens munasabah bahawa perayu bukan pelakunya dan seorang perempuan boleh mencederakan si mati. Selanjutnya, keterangan ikut keadaan yang dikemukakan oleh perayu dalam kes ini terlalu lemah untuk membawa kepada hipotesis kebersalahan perayu (lihat perenggan 30–32).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Choo Kok Beng v Choo Kok Hoe & Ors [1984] 2 MLJ 165b, PC (refd)
Dato' Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Magendran all Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
Multar v Lim Kim Chet & Anor [1982] 1 MLJ 184, FC (refd)
PP v Hanif Basree bin Abdul Rahman [2008] 3 MLJ 161, FC (refd)
Rishi Pal v State of Uttarakhand 2013 (2) ACR 147, SC (refd)
Sivalingam all Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)
Yap Boon Thai v PP [2013] 6 MLJ 236, CA (refd)

Legislation referred to

Penal Code s 302

Appeal from: Criminal Trial No MT3–45B-64 of 2010 (High Court, Shah Alam)

Murali Achan all PE Achan (Kulasekar all Kulasingam with him) (K Kulasekar, Achan & Assoc) for the appellant.
Andi Razalijaya bin A Dadi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

A Zawawi Salleh JCA (delivering judgment of the court):

THE ANTECEDENTS

B [1] This is an appeal against the judgment dated 29 September 2011 passed by the High Court at Shah Alam, Selangor, by which the Court convicted the appellant under s 302 of the Penal Code ('the Code') and sentenced him to death.

C [2] The appellant was charged as follows:

D Bahawa kamu, pada 3 Mac 2010 di antara jam 9.40 malam hingga 10.10 malam di Taman Permainan Kanak-kanak Pangsapuri Vista Damansara, Jalan Kenangan, Kampung Sungai Ayu Ara, 47400 Petaling Jaya, di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, telah melakukan pembunuhan dengan niat menyebabkan kematian kepada Haresvarra a/l Karigalan No. KP: 080828-10-2553. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

E [3] Aggrieved, the appellant lodged this appeal to challenge the legality and correctness of the conviction and sentence.

F [4] We have heard Mr Murali Achan and Mr Kulasekar, learned counsel appearing for the appellant and Mr Andi Razalijaya A Dadi, learned deputy public prosecutor ('DPP') appearing for the public prosecutor. We have given our thoughtful consideration to the arguments advanced by them. We have also perused the appeal records of this case and closely scrutinised the evidence led by both the parties.

G [5] We are mindful that this is a factually based appeal. In the course of the submission before us, the DPP had reminded us the danger of interfering with the finding of facts of the trial judge, who had seen and heard the witnesses.

H [6] The basic principle which guides our courts in appeals against findings of fact is trite. An appellate court will not impeach the finding of facts by a first instance or trial court that saw and heard witnesses give evidence, except in certain very limited circumstances. An appellate court may, however, interfere in a case in which the reasons given by a trial judge are not satisfactory, or where it is clear from the evidence that the trial judge misdirected himself. Where a trial judge misdirects himself or herself and draws erroneous inferences from the facts, an appellate court is in as good a position as the trial judge to evaluate the evidence and determine what inference should be drawn from the proved facts. Where therefore there is an appeal against the finding of facts, the burden upon the appellant is a very heavy one. An appellate court will only interfere if

it finds that the court of first instance was clearly and blatantly wrong, or, as it is sometimes more elegantly stated, exceeded the generous ambit within which reasonable disagreement is possible (see *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545 (CA); *Multar v Lim Chet & Anor* [1982] 1 MLJ 184 (FC); *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165b).

A
B

[7] Having scrutinised the entire evidence adduced before the court, we are of the considered opinion that this is a case in which appellate intervention is warranted. On the facts of the present case it would be unsafe to allow the conviction of the appellant to stand. We are not satisfied that the prosecution had proved its case to the required standard. For that reason we unanimously allowed the appeal and set aside the conviction and sentence passed by the High Court. The appellant was acquitted and discharged. We now give our reasons for so deciding.

C
D

FACTS OF THE CASE

[8] Put in a short frame, the facts giving rise to the arrest and eventual conviction of the appellant is that in November 2009, Thilagavathy a/p Krishnamoorthy ('SP9') had arranged the appellant's wife, who was staying at the same flat, as the deceased's babysitter. However, the appellant's wife only took care of the deceased for two weeks. The deceased refused to be sent to the appellant's house and cried and throw tantrum every time his mother attempted to coax him to the babysitter.

E
F

[9] Prior to the tragic incident, the appellant and his wife had expressed their desire to adopt the deceased as they did not bear any child of their own.

[10] On 3 March 2010, around 8pm, SP9 went for a job interview. She had sent her child, Haresvarra (deceased) to Kavitha a/p Tamilchelvan's ('SP8') house to be babysitted by Sathayee a/p Mathuveeran ('SP7'). SP7 is the grandmother to SP8.

G
H

[11] SP9 had also told the appellant's wife to check on the child as she was concerned that her child might be uncomfortable at a stranger's house.

[12] According to SP7, the deceased played with SP7's great grandchildren, Karthik and a puppy before the appellant came and took the deceased away. The appellant came to her home at 9.45pm.

I

- A** [13] SP7 stated that the deceased was seen crying and refused to follow the appellant. SP7 tried to prevent the appellant from taking away the child. The appellant told her that he only intended to give the child some chocolates and would return him later.
- B** [14] When the appellant returned to SP7's house, the child was seen to be weak and suffered breathing difficulty. SP8 and her husband returned to the house and rushed the deceased to a nearby clinic. The appellant and his wife also rushed to the same clinic with SP8.
- C** [15] The deceased was brought to Dr Teo Boon Chin's ('SP6') clinic. According to SP6, the initial examination showed that the child was already dead when taken to receive treatment.
- D** [16] Autopsy on the deceased's body was performed by the pathologists, Dr Karunakaran Mathiharan ('SP4'). He confirmed that the deceased's cause of death was 'shock and haemorrhage due to liver injury'.
- E** [17] It is on the basis of the aforesaid evidence that we shall endeavour to determine the issue canvassed by learned counsel for the appellant.

THE APPEAL

- F** [18] The solitary contention advanced by learned counsel for the appellant on the merits of the case was that the prosecution had ventured to substantiate the charge against the appellant only on the basis of circumstantial evidence. There was no direct evidence implicating the appellant in the alleged murder of the deceased. The physical evidence adduced by the prosecution supports the fact that the deceased was assaulted by another person and not the appellant.
- G** [19] The DNA of the male person found in the nail clipping of the deceased was not attributed to the appellant and the presence of a female person was not explained by the prosecution. The deceased also suffered injuries to his lower abdominal and scrotal area. This scratch abrasion, according to SP4, was
- H** consistent with it being caused by a women's nails.
- I** [20] Learned counsel for the appellant emphatically contended that the prosecution has miserably failed to establish the chain of circumstances so as to make it complete and unerringly pointing the appellant with the alleged offence of the murder of the deceased. Therefore, the appellant is entitled to an order of acquittal and the conviction and sentence imposed by the High Court should be set aside.

[21] Learned DPP on the other hand wholeheartedly supported the

impugned judgment. According to him, the circumstance relied upon by the prosecution had been accepted by the trial court. They are as follows: A

- (a) the appellant was last seen with the deceased;
- (b) the deceased was crying when the appellant took him away; B
- (c) the deceased was not comfortable and will always cry when sighted the appellant; and
- (d) the deceased suffered from breathing difficulty when the appellant returned him to SP7's house. C

FINDINGS OF THIS COURT

[22] In this instant case, there is no dispute that the case for the prosecution is essentially based on the circumstantial evidence. The law on circumstantial evidence is well settled. In a plethora of decisions, the courts in our country have laid down the guidelines for appreciation of evidence in a case of this nature. In *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232, the Federal Court stated that: D

Where circumstantial evidence is the basis of the prosecution case the evidence proved must irresistibly point to one and only one conclusion, the guilt of the accused, but in a case tried without a jury the failure by the Court to expressly state this is not fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt (*Jayaraman and Ors v Public Prosecutor* [1982] 2 MLJ 306 at p 310). E F

[23] In *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805 , the Federal Court discussed the status of circumstantial evidence and stated that: G

The entire prosecution case rested on circumstantial evidence ...

The question, therefore, is whether the prosecution proved the guilt of the appellant beyond all reasonable doubt. In a case of circumstantial evidence, all the circumstances from which the conclusion of the guilt is to be drawn should be fully and cogently established. The circumstances must be satisfactorily established and the proved circumstances must bring home the offences to the accused beyond all reasonable doubt. ... In other words when there is no direct witness to the commission of murder and the case rests entirely on circumstantial evidence, the circumstances relied on must be fully established ... H

... If any of the circumstances proved in a case are consistent with the innocence of the accused or the chain of the continuity of the circumstances is broken, the accused is entitled to the benefit of the doubt. ... There is a long distance between may be true and must be true. The prosecution has to travel all the way to establish fully all the chain of events which should be consistent only with hypothesis of the guilt of the accused ... I

- A ... In other words, there must be a chain of evidence so far consistent and complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all probability the act must have been done by the accused and the accused alone.
- B [24] It is clear from the cases cited above that in a case based on circumstantial evidence, the circumstances must unerringly lead to one conclusion consistent only with the hypothesis of the guilt of the accused and every incriminating circumstances must be clearly established by reliable and clinching evidence. Circumstances so proved must form a chain of events from
- C which the only irresistible conclusion that could be drawn is the guilt of the accused and that no other hypothesis against the guilt is possible.
- D [25] Coming back to the present case, SP7 testified that the appellant came to the flat and took the deceased away. After 10 minutes, the appellant returned with the deceased. According to SP7, the deceased was having the difficulty breathing and appeared weak. SP7's son, Subramaniam, questioned the appellant about the state of the deceased. Subramaniam suspected the appellant of doing something wrong to the deceased and demanded that he
- E wait in the flat.
- F [26] Learned DPP submitted that the fact the appellant and the deceased being last seen will complete the chain of circumstances for the court to make a finding that it is consistent only with the hypothesis of the guilt of the appellant.
- G [27] With respect, we disagree with the submission. The fact that the appellant was last seen with the deceased may have created suspicions of his guilt, but not enough to prove the case against him beyond reasonable doubt. It is trite that last seen evidence does not by itself necessarily leads to an irresistible inference that the appellant committed the crime unless the same is duly supported by other links in the chain of circumstances evidence unerringly pointing out the guilt of the appellant. It should also be noted that
- H the last seen evidence is only relevant evidence to complete the chain of circumstantial evidence; however the conviction cannot be solely based on this piece of evidence. Dealing with the principle of last seen evidence, the Supreme Court of India in *Rishi Pal v State of Uttarakhand* 2013 (2) ACR 147, had this to say:
- I 16 In *Mohibur Rahman and Anr v State of Assam* (2002) 6 SCC 715, this Court held that the circumstance of last seen does not by itself necessarily lead to the inference that it was the accused who committed the crime. It depends upon the facts of each case. There may however be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible

conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. Similarly in *Arjun Marik and Ors v State of Bihar* 1994 Supp (2) SCC 372, this Court reiterated that the solitary circumstance of the accused and victim being last seen will not complete the chain of circumstances for the Court to record a finding that it is consistent only with the hypothesis of the guilt of the accused. No conviction on that basis alone can, therefore, be founded. So also in *Godabarish Mishra v Kuntala Mishra and Another* (1996) 11 SCC 264, this Court declared that the theory of last seen together is not of universal application and may not always be sufficient to sustain a conviction unless supported by other links in the chain of circumstances. In *Bharat v State of MP* (2003) 3 SCC 106; two circumstances on the basis whereof the Appellant had been convicted were (i) the Appellant having been last seen with the deceased and (ii) Recovery of ornaments made at his instance. This Court held: Mere non-explanation cannot lead to the proof of guilt against the Appellant. The prosecution has to prove its case against the Appellant beyond reasonable doubt. The chain of circumstances, in our opinion, is not complete so as to sustain the conviction of the Appellant

20. Suffice it to say that even if we take the most charitable liberal view in favour of the prosecution, all that we get is a suspicion against the Appellant and no more. The High Court was in that view justified in setting aside the order passed by the trial Court and acquitting the Appellant of the offence of murder under Section 302 IPC. The order passed by the High Court deserves to be affirmed giving to the appellant the benefit of doubt. We accordingly dismiss the appeal filed by the appellant and discharge the notice of show-cause issued to him.

[28] In this instant case, the prosecution failed to establish by positive evidence any motive on the part of the appellant to murder the deceased. It is fairly well-settled that while motive does not have a major role to play in cases based on eye-witness account of the incident, it assumes importance in cases that rest entirely on circumstances evidence (see *Yap Boon Thai v Public Prosecutor* [2013] 6 MLJ 236). Absence of motive in this case, therefore, is clearly a matter to be taken into account by the court. In so far as motive is concerned, SP9's evidence was much in favour of the appellant. She said that the appellant and his wife were very fond of the deceased and had expressed their desire to adopt the deceased. SP9 also stated that there were instances in which the appellant had helped her to send the deceased to seek medical treatment at the local clinic. The fact that he rushed the deceased to the clinic would neutralised any suggestion that he personally want the deceased dead.

[29] It was the prosecution's contention that the appellant allegedly stomped on the deceased at Taman Permainan. However, there was no evidence of the appellant's footprints on the deceased's clothing. The police also did not retrieve any soil or bitumen from the crime scene to connect or implicate the appellant.

A [30] In our view, the prosecution's case was hampered with the existence of the DNA belonging to the 'unknown female' found in the deceased's finger nail clippings. There was no attempt by the prosecution to explain the presence of the female DNA profile. Several inferences could be made from the findings of such evidence (see *Public Prosecutor v Hanif Basree bin Abdul Rahman* [2008] 3 MLJ 161)

B [31] SP4, during cross-examination, stated that injuries No 10 to No 14 found on the deceased's body were scratch abrasion caused by sharp object consistent with woman nails.

C [32] We agree with learned counsel for the appellant that the trial judge misdirected himself when he failed to rule at the end of the prosecution's case that the prosecution had failed to establish a prima facie case against the appellant. The circumstantial evidence relied upon by the prosecution coupled with the presence of female DNA profile, give rise to a reasonable inference that the appellant may not be the perpetrator and a female could have injured the deceased. Furthermore, at any rate the chain of circumstantial evidence in this case is not so complete as to lead to the hypothesis of guilt of the appellant.

D [33] Before we conclude, we must say that in dealing with the circumstantial evidence, there is always danger that conjecture or suspicion lingering on mind may take place of proof and therefore the court has to judge watchfully and ensure that the conjecture and suspicion do not take place of legal proof.

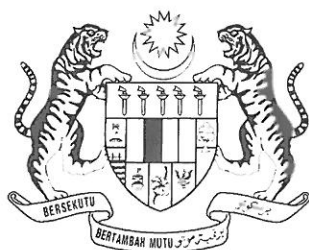
E F CONCLUSION

G [34] After taking all the facts and circumstances of this case in consideration, we do not find ourselves in agreement with the findings arrived at by the learned trial judge. The circumstances evidence presented by the prosecution in this case was so lacking that the defence of the appellant should not have been called at the first place; let alone convicted him even after the defence was called.

H [35] In the result, we allowed the appeal and set aside the conviction and sentence passed by the High Court. The appellant was acquitted and discharged.

Appeal allowed and setting aside the conviction and sentence set aside.

I Reported by Afiq Mohamad Noor



LAWS OF MALAYSIA

Act 846

**ABOLITION OF MANDATORY DEATH
PENALTY ACT 2023**

Amendment of section 214

31. Section 214 of the Code is amended by inserting after the words “imprisonment which may extend to ten years” the words “or upwards”.

Amendment of section 216

32. Subsection 216(1) of the Code is amended by inserting after the words “imprisonment for ten years” the words “or upwards”.

Amendment of section 221

33. Paragraph 221(b) of the Code is amended by inserting after the words “imprisonment for a term which may extend to ten years” the words “or upwards”.

Amendment of section 302

34. Section 302 of the Code is amended by inserting after the words “with death” the words “or imprisonment for a term of not less than thirty years but not exceeding forty years and if not sentenced to death, shall also be punished with whipping of not less than twelve strokes”.

Amendment of section 307

35. Section 307 of the Code is amended by deleting subsection (2).

Amendment of section 364

36. Section 364 of the Code is amended by substituting for the words “death or imprisonment for a term which may extend to thirty years and shall, if he is not sentenced to death, also be liable to whipping” the words “imprisonment for a term of not more than thirty years and shall also be punished with whipping”.

A

Md Masud Rana v Public Prosecutor

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL
NO J-05(M)-511-10 OF 2019
VAZEER ALAM MYDIN, HASHIM HAMZAH AND AZMI
ARIFFIN JJCA
23 JANUARY 2024

C

Criminal Law — Appeal — Appeal against sentence — Appellant was found guilty under s 302 of Penal Code — High Court judge sentenced appellant to death — Appellant appealed against sentence — Whether amendment to s 302 of Penal Code pursuant to s 34 of the Abolition of Mandatory Death Penalty Act 2023 applicable in the present appeal — Whether the death penalty ought to be changed to a term of imprisonment — Abolition of Mandatory Death Penalty Act 2023 s 34 — Penal Code s 302

D

E

This was a heartbreaking case of relationship turned sour which ended with the murder of the deceased by the appellant. Both the deceased and the appellant suffered injuries in this case and the cause of death of the deceased was multiple sharp injuries. At the end of the case, the learned High Court judge rejected the defence of self defence and provocation raised by the appellant, convicted the appellant under s 302 of the Penal Code ('the PC') and sentenced the appellant to death by hanging, hence, the present appeal. Initially, the appellant had filed appeals against both the conviction and sentence but subsequently the appellant withdrew the appeal against the conviction and only proceeded with the appeal against the sentence. The appellant prayed for the death penalty to be changed to a term of imprisonment. In the mitigating submission, the appellant highlighted that since both the deceased and the appellant were injured in the incident, a lighter sentence should be granted to the appellant in this appeal. The appellant further requested that the imprisonment term to run from the date of the arrest. The prosecution on the other hand submitted that the death sentence granted by the learned High Court judge should be affirmed.

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Held:

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- (1) Previously, the punishment for murder under s 302 of the PC was the death penalty only. Via s 34 of the Abolition of Mandatory Death Penalty Act 2023 ('Act 846'), s 302 of the PC was amended by inserting after the words, 'with death' the words 'or imprisonment for a term of not less than thirty years but not exceeding forty years and if not sentenced to death, shall also be punished with whipping of not less than twelve strokes'. This

amendment came into effect on 4 July 2023, as such, this amendment was applicable to the present appeal (see paras 33–34).

- (2) For offences under s 302 of the PC, Act 846 had given the discretionary power to the court to determine the punishment that should be given to the accused, which was either the death penalty or a prison sentence of not less than 30 years which could be extended up to 40 years and whipping not less than 12 lashes. In this situation, the court opined that the court could still consider the applicable legal principles in deciding whether the death penalty should be imposed or otherwise. The introduction of Act 846 did not in any way prevent the court from referring to the basis of the existing sentencing principle (see paras 35–36).
- (3) The court also referred to the official statement of the Dewan Rakyat (15th Parliament, Second Term First Meeting) on 3 April 2023, which stated that the Parliament's intention to amend the existing law by introducing Act 846 to abolish the death penalty was an initial step in transforming the justice system of crime in Malaysia. In addition, the basic principle behind every sentencing in Malaysia was the rehabilitation of prisoners so that they could return to society and become individuals who served the family, community, and country after completing their sentence. The court also took this into account (see para 37).
- (4) After examining the plea of mitigation from the appellant and the submission by the prosecution for a deterrence sentence, the court found it appropriate for the appellant to be sentenced to imprisonment for a term of 35 years from the date of arrest and 12 strokes of whipping (see para 38).

[Bahasa Malaysia summary]

Ini adalah kes menyayat hati sebuah hubungan yang bertukar menjadi buruk yang berakhir dengan pembunuhan si mati oleh perayu. Kedua-dua si mati dan perayu mengalami kecederaan dalam kes ini dan punca kematian si mati adalah beberapa kecederaan tajam. Pada akhir kes, hakim Mahkamah Tinggi Yang Arif menolak pembelaan pertahanan diri dan provokasi yang dibangkitkan oleh perayu, mensabitkan perayu di bawah s 302 Kanun Keseksaan ('KK') dan menjatuhkan hukuman gantung sampai mati kepada perayu, oleh itu, rayuan semasa. Pada mulanya, perayu telah memfailkan rayuan terhadap sabitan dan hukuman tersebut tetapi kemudiannya perayu menarik balik rayuan terhadap sabitan dan hanya meneruskan rayuan terhadap hukuman. Perayu memohon agar hukuman mati ditukar kepada pemenjaraan. Dalam hujahan mitigasi, perayu menekankan bahawa memandangkan kedua-dua si mati dan perayu telah cedera dalam kejadian tersebut, hukuman yang lebih ringan harus diberikan kepada perayu dalam rayuan ini. Perayu seterusnya meminta supaya

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- A tempoh pemenjaraan berjalan dari tarikh tangkapan. Pihak pendakwaan sebaliknya berhujah bahawa hukuman mati yang diberikan oleh hakim Mahkamah Tinggi Yang Arif perlu disahkan.

Diputuskan:

- B (1) Sebelum ini, hukuman bagi pembunuhan di bawah s 302 KK adalah hukuman mati sahaja. Melalui s 34 Akta Pemansuhan Hukuman Mati Mandatori 2023 ('Akta 846'), s 302 KK telah dipinda dengan memasukkan selepas perkataan, 'with death' perkataan 'or imprisonment
- C for a term of not less than thirty years but not exceeding forty years and if not sentenced to death, shall also be punished with whipping of not less than twelve strokes'. Pindaan ini berkuat kuasa pada 4 Julai 2023, oleh itu, pindaan ini terpakai pada rayuan semasa (lihat perenggan 33–34).
- D (2) Bagi kesalahan di bawah s 302 KK, Akta 846 telah memberikan kuasa budi bicara kepada mahkamah untuk menentukan hukuman yang sepatutnya diberikan kepada tertuduh, iaitu sama ada hukuman mati atau hukuman penjara tidak kurang daripada 30 tahun yang boleh dilanjutkan sehingga 40 tahun dan sebatan tidak kurang daripada
- E 12 sebatan. Dalam situasi ini, mahkamah berpendapat mahkamah masih boleh mempertimbangkan prinsip undang-undang yang terpakai dalam memutuskan sama ada hukuman mati perlu dikenakan atau sebaliknya. Pengenalan Akta 846 tidak sama sekali menghalang mahkamah daripada merujuk kepada asas prinsip hukuman sedia ada (lihat perenggan 35–36).
- F (3) Mahkamah juga merujuk kepada Penyata Rasmi Dewan Rakyat (Parlimen Ke-15, Mesyuarat Pertama Penggal Kedua) pada 3 April 2023, yang menyatakan hasrat Parlimen untuk meminda undang-undang sedia ada dengan memperkenalkan Akta 846 untuk memansuhkan hukuman
- G mati adalah satu langkah awal dalam mengubah sistem keadilan jenayah di Malaysia. Di samping itu, prinsip asas di sebalik setiap hukuman di Malaysia ialah pemulihan banduan supaya mereka boleh kembali ke dalam masyarakat dan menjadi individu yang berkhidmat kepada
- H keluarga, masyarakat dan negara selepas tamat menjalani hukuman. Mahkamah juga mengambil kira perkara ini (lihat perenggan 37).
- I (4) Selepas meneliti rayuan mitigasi daripada perayu dan penghujahan oleh pihak pendakwaan untuk hukuman pencegahan, mahkamah mendapati wajar bagi perayu dijatuhi hukuman penjara selama tempoh 35 tahun dari tarikh tangkap dan 12 sebatan (lihat perenggan 38).]

Legislation referred to

Abolition of Mandatory Death Penalty Act 2023 s 34
Penal Code s 302

Appeal from: *Public Prosecutor v Md Masud Rana* [2019] MLJU 1533 (High Court, Johor Bahru) **A**

Vijaya Sandran all Tangavellu (with Kirthana Darshayinie) (Vijaya Sandran & Assoc) for the appellant.

Mohd Amril bin Johari (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent. **B**

Hashim Hamzah JCA:

INTRODUCTION **C**

[1] This is an appeal by the appellant against the conviction by the learned High Court judge ('LHCJ') who found the appellant guilty of murder and sentence him to death by hanging. **D**

[2] On the hearing date of this appeal, the appellant's counsel informed us that the appellant wanted to withdraw his appeal against the conviction and only proceed with appeal against the sentence. The deputy public prosecutor ('DPP') has no objection. **E**

[3] The appellant in the present appeal was charged under s 302 of the Penal Code. The charge against the appellant reads:

Bahawa kamu pada 23 Disember 2016 di antara jam 4.00 pagi hingga 6.40 pagi di alamat No 9, Jalan Beladai 26, Taman Puteri Wangsa, Ulu Tiram di dalam Daerah Johor Bahru di dalam Negeri Johor Darul Takzim, telah melakukan kesalahan membunuh dengan menyebabkan kematian ke atas Conda Liezyl Ponce (No Passport: EB 5547222) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan. **F**

[4] In the High Court, the appellant did not plead guilty to the charge and claimed for trial. **G**

THE PROSECUTION'S CASE **H**

[5] The prosecution called 14 witnesses, and briefly, the evidence led by the prosecution as narrated by the LHCJ in her grounds of judgment is as follows.

[6] On 23 December 2016 at around 7am, Encik Syed Khairrul Annuar bin Veran ('SP11') received a telephone call from the appellant informing SP11 in a crying tone that he was feeling pressured, wanted to kill himself and that his time was up. SP11 subsequently tried to contact the appellant several times but there was no answer. **I**

- A [7] Later, SP11 went to the appellant's rented room at No 9, Jalan Beladau 26, Taman Puteri Wangsa, Ulu Tiram. Upon his arrival, the room was locked from the inside, however, SP11 managed to open the door from the outside using a kitchen knife. SP11 then saw the appellant with a woman ('the deceased') lying face down on the mattress with a lot of blood and the room in a mess. SP11 then contacted the ambulance and the police to come to the scene.
- B
- C [8] Between 7.30am and 7.35am, Encik Abdul Khalid bin Abdul Razak ('SP12') arrived at the scene after SP11 contacted him. SP12 saw the deceased on the mattress in the room. There was no one else in the room other than the appellant and the deceased. SP12 heard the appellant groaning softly in pain.
- D [9] SP11 contacted the nearest police station to lodge a report. Lance Corporal Mohamad Nur Ashraf bin Mohd Dali ('SP5') received the report and lodged Pelangi Indah Report/008935/16.
- E [10] ASP Akup ak Janggu ('SP7'), the Chief Police at the Taman Pelangi Police Station went to the scene at approximately 8.10am together with Corporal Mohd Laily bin Ramli, Lance Corporal Khairul Adha, Support Lance Corporal Mohd Rizal and Lance Corporal Mohamad. Upon their arrival at the shop house, SP7 met SP11 and SP12 before SP7 was taken by SP11 to the room where the incident happened.
- F [11] SP7 then saw the deceased in the room and SP7 contacted the police station to inform the investigating officer ('IO') and the forensic team to come to the scene. At about 9am, the IO ('SP14') and the forensic team led by the ASP Tha Na Sak ('SP4') arrived to conduct further investigations on the deceased and the room.
- G [12] The appellant who was assisted by SP7 and two station personnel went down to the ground floor and was surrendered to the ambulance as the appellant was injured in the stomach.
- H [13] The shop house where the incident occurred belongs to Puan Eng Yet Ken ('SP8') since 1992 which was rented to Encik Aramugam a/l Mutuveli ('SP9') since 2003. There are two floors to the premises. SP9 is the tenant for the shop house who initially rented the shop house for his business of supplying labour to the factories. SP9 confirmed that the upper floor of the shop house was used for his workers to sleep and that there were six rooms. However, when the factories closed down, SP9 utilised the ground floor for a saloon business and the upper floor was rented out, including to the appellant. The appellant was tasked to collect rentals from all tenants and give the rentals to SP9. Room three, five and six were vacant with no tenants.
- I

[14] SP9 confirmed that at 2am when he was on the ground floor of the shop house he heard loud noises from the upper floor of the shop house. Later, at around 6.45am to 7.45am, SP9 went up to the first floor and saw two men, SP11 and SP12, in front of the appellant's room. SP9 saw the appellant and a woman in the said room but SP9 did not go into the room. Instead SP9 went downstairs to the last shop house and sat on the stone by the road side.

A

B

[15] The forensic team led by SP4 carried out an inspection on the deceased and found four stab wounds on the stomach of the deceased and laceration on the deceased's left foot. A knife stained with blood was found near the mattress. A machete (*parang*) was also found approximately two feet from the mattress. The deceased was Conda Liezyl Ponce (Passport No: EB 5547222) a Filipina national.

C

[16] The pathologist, Dr Rohayu bt Syahar Adnan ('SP13') conducted a post mortem on the deceased on 23 December 2016 at 3.45pm. Based on the decomposition of the corpse, SP13 confirmed that the approximate time of death of the deceased is less than 24 hours, that is between 3.45pm on 22 December 2016 and the time of the post mortem.

D

E

[17] In summary, SP13's post mortem report (P20) concluded the following:

- (a) the deceased sustained multiple blunt injuries on the head, torso and limbs. There were also superficial sharp injuries which were not fatal but consistent with defense wounds;
- (b) chop wound sustained by deceased were due to sharp object with single edge blade;
- (c) chop wounds to the head had severed the skull and corresponding blood vessels;
- (d) stab wound to the abdomen had severed the major abdominal artery and vein which were inferior mesentery artery, inferior vena cava and right renal vein; and
- (e) combination of both chop and stab wounds were incompatible with life.

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[18] Based on the findings of P20, SP13 found the cause of death of the deceased to be from multiple sharp injuries.

I

[19] SP14's investigation of the rented room occupied by the appellant and the deceased shared that there were no signs of intrusion by another person or that the appellant and the deceased were attacked by another person that resulted in death. The appellant was injured on the left side of his stomach

A which resulted in part of his bowels protruding. SP13 confirmed that the injury sustained by the appellant was not serious.

[20] SP14's investigation concluded that the appellant is the only suspect in this murder. No one else other than the appellant was involved in the incident.

B

Findings of the LHCJ at the end of prosecution's case

C [21] At the close of the prosecution's case, the LCHJ held that the prosecution had successfully proven a prima facie case against the appellant for the charge of murder under s 302 of the Penal Code. Thus, the appellant was consequently ordered to enter his defence.

THE DEFENCE'S CASE

D

[22] The appellant chose to take stand and give evidence under oath. The defence put by the appellant was both the appellant and the deceased (the appellant's girlfriend) had met on 22 December 2016 and drank liquor together.

E

[23] Whilst drinking, there had been a few heated arguments between them as the deceased demanded to check appellant's mobile phone and for the appellant to divorce his wife.

F

[24] The deceased then went to the toilet and upon returning, the appellant saw that the deceased had a knife in her hand and proceeded to stab appellant in the stomach. The appellant managed to avoid being stabbed again, and a physical fight ensued but due to the extreme pain, lost his consciousness. Upon regaining consciousness, the appellant called SP11.

G

H [25] The second defence witness was Dr Abdul Hazim bin A Baba ('SD2') who was the doctor that prepared the medical report (IDD22) for the appellant's injury at Hospital Sultan Ismail, Johor Bahru. Based on IDD22, it was stated that the initial examination of the appellant's injury was 'alleged stab wound injury' with protrusion bowel and perforation of bowel. As a result of the injury, an emergency surgery was conducted on the appellant as there were two punctures to the bowel approximately 1cm and 0.5cm respectively.

I

[26] SD2 was of the view that a person who had such an injury as the appellant could lead to death if the injury was not treated. SD2 also testified that the appellant was responsive and the appellant was mentally able to think clearly while sustaining the injury.

[27] During re-examination, SD2 further stated that there is a possibility that the appellant's movement was limited due to the pain he felt.

A

Findings of the LHCJ at the end of defence's case

[28] At the end of the defence's stage, the LHCJ rejected the defence of self defence and provocation raised by the appellant, hence, found that the appellant had failed to raise a reasonable doubt in the prosecution case for murder. As a result, the appellant was convicted of murder under s 302 of the Penal Code and sentenced to death by hanging.

B

C

THE PRESENT APPEAL

[29] As mentioned above, the appeal before us is only against the sentence. Therefore, we have asked the appellant's counsel and also the DPP to make a mitigation appeal related to the sentence.

D

[30] The appellant's counsel submitted before us that the appellant prayed for the death penalty to be changed to a term of imprisonment. It was highlighted in the appellant's mitigating submission that since both the deceased and the appellant was injured in the incident, a lighter sentence should be granted to the appellant in this appeal.

E

[31] The appellant also further request that the imprisonment term to run from the date of the arrest.

F

[32] On the other hand, the DPP submitted that the death sentence granted by the LHCJ should be affirmed. But the DPP also leaves to the discretion of this court if this court wishes to sentence the appellant to imprisonment.

G

OUR ANALYSIS AND FINDINGS

[33] Previously, the punishment for murder under s 302 of the Penal Code was the death penalty only. Through s 34 of the Abolition of Mandatory Death Penalty Act 2023 ('Act 846'), s 302 of the Penal Code was amended by inserting after the words, 'with death' the words 'or imprisonment for a term of not less than thirty years but not exceeding forty years and if not sentenced to death, shall also be punished with whipping of not less than twelve strokes'.

H

[34] This amendment comes into effect on 4 July 2023 through the PU Gazette (B) 229 dated 30 June 2023. Therefore, this amendment applies to the appeal before us.

I

[35] For offenses under s 302 of the Penal Code, Act 846 has given the

A discretionary power to this court to determine the punishment that should be given to the accused, which is either the death penalty or a prison sentence of not less than 30 years which can be extended up to 40 years and whipping not less than 12 lashes.

B [36] In this situation, we are of the opinion that we can still consider the applicable legal principles in deciding whether the death penalty should be imposed or otherwise. The introduction of Act 846 does not in any way prevent us from referring to the basis of the existing sentencing principle.

C [37] We also refer to the official statement of the Dewan Rakyat (15th Parliament, Second Term First Meeting) on 3 April 2023, which stated that Parliament's intention to amend the existing law by introducing Act 846 to abolish the death penalty is an initial step in transforming the justice system crime in Malaysia. In addition, the basic principle behind every sentencing in
D Malaysia is the rehabilitation of prisoners so that they can return to society and become individuals who serve the family, community and country after completing their sentence. The court also needs to take this into account.

CONCLUSION

E [38] In conclusion, after examining the plea of mitigation from the appellant and the submission by DPP for a deterrence sentence, we found it appropriate for the appellant in this appeal to be sentenced to imprisonment for a term of
F 35 years from the date of arrest and 12 strokes of whipping.

Order accordingly.

Reported by Dzulqarnain Ab Fatar

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A

Mohd Hafiz bin Mohamad v Public Prosecutor

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL
NO T-05(M)-399-09 OF 2019
HADHARIAH SYED ISMAIL, AZMAN ABDULLAH AND AZIZUL
AZMI ADNAN JJCA
7 FEBRUARY 2024

C

Criminal Procedure — Appeal — Appeal against sentence — Whether facts of case did not warrant imposition of death penalty — Whether sentence of 35 years' jail plus 12 strokes of whipping was appropriate — Court's discretion under Abolition of Mandatory Death Penalty Act 2023

D

The appellant was sentenced to death by the High Court after it found him guilty on a charge of committing murder. In his instant appeal, the appellant withdrew his appeal against his conviction and only pleaded for his sentence to be reduced to imprisonment plus whipping as provided under the Abolition of Mandatory Death Penalty Act 2023. The trial court had found that the appellant had caused a man's death by stabbing him several times in the chest with a knife in the parking lot of the district religious affairs department in Kuala Terengganu after the two of them had had an argument. The appellant, the deceased, the latter's sister (with whom the appellant had a 'special relationship') and her family members had earlier gone to the said department to check on the appellant's marital status. The appellant had gone to the department with his friend ('SP21') in the latter's car and had brought with him the knife concealed in a paper bag which he had left on the floorboard of the car.

G

Held, affirming the conviction, allowing the appeal against sentence and replacing the death sentence with a sentence of 35 years' jail and 12 strokes of whipping:

H

(1) After considering the facts of the case by the prosecution and the defence put forward by the appellant, the court was of the considered view that the circumstances of the instant case did not warrant the imposition of the death penalty and that in its place, a sentence of 35 years' jail together with 12 strokes of whipping was appropriate (see paras 17 & 19).

I

(2) Even though the deceased suffered multiple stab wounds to the chest, SP21's evidence stated that there was a quarrel between the appellant and the deceased before the stabbing. This negated the element of premeditated murder although the appellant had brought the knife with him, but the knife was left in the car. There was no evidence that the

appellant had used any force to bring the deceased near the car. The court believed that the appellant was about to leave the place when the unfortunate event happened (see para 18).

[Bahasa Malaysia summary]

Perayu telah dijatuhkan hukuman mati oleh Mahkamah Tinggi selepas mendapati dia bersalah atas satu pertuduhan bunuh. Dalam rayuan ini, perayu menarik balik rayuannya terhadap sabitannya dan hanya memohon agar hukumannya dikurangkan kepada penjara serta sebat seperti yang diperuntukkan di bawah Akta Pemansuhan Hukuman Mati Mandatori 2023. Mahkamah perbicaraan mendapati perayu telah menyebabkan kematian seorang lelaki dengan menikamnya beberapa kali di dada dengan pisau di tempat letak kereta jabatan hal ehwal agama daerah di Kuala Terengganu selepas kedua-dua mereka bertengkar. Perayu, si mati dan adik perempuannya (perayu mempunyai 'hubungan sulit' dengannya) dan ahli keluarganya sebelum ini telah pergi ke jabatan tersebut untuk memeriksa status perkahwinan perayu. Perayu telah pergi ke jabatan itu bersama rakannya ('SP21') di dalam kereta si mati dan telah membawa bersama pisau yang disembunyikan di dalam beg kertas yang ditinggalkan di lantai kereta.

Diputuskan, mengekalkan sabitan, membenarkan rayuan terhadap hukuman dan menggantikan hukuman mati dengan penjara selama 35 tahun dan 12 sebatan:

- (1) Selepas mempertimbangkan fakta kes oleh pihak pendakwaan dan pembelaan yang dikemukakan oleh perayu, mahkamah berpendapat bahawa keadaan kes ini tidak menjamin hukuman mati dan untuk menggantikannya, hukuman penjara 35 tahun bersama 12 sebatan adalah sesuai (lihat perenggan 17 & 19).
- (2) Walaupun si mati mempunyai beberapa luka tikaman di dada, keterangan SP21 menyatakan bahawa terdapat pertengkaran antara perayu dan si mati tikaman tersebut berlaku. Hal ini menafikan unsur pembunuhan yang dirancang walaupun perayu telah membawa pisau bersamanya, namun pisau ditinggalkan di dalam kereta. Tiada keterangan yang menunjukkan bahawa perayu telah menggunakan sebarang paksaan untuk membawa si mati berhampiran kereta. Mahkamah berpendapat bahawa perayu hampir meninggalkan tempat itu namun kejadian malang itu telah berlaku (lihat perenggan 18).]

Cases referred to

Alowonle Oluwajuwon Gilbert v PP [2023] MLJU 2628, CA (refd)
Packer v Packer [1953] 2 All ER 127, CA (refd)

A Legislation referred to

Abolition of Mandatory Death Penalty Act 2023
Penal Code s 302

B Appeal from: *Pendakwa Raya lwn Mohd Hafiz bin Mohamad* [2019] MLJU 2129 (High Court, Kuala Terengganu)

Mazlan bin Md Zain (Mohd Yusof Endut & Assoc) for the appellant.
Atiqah bt Abdul Karim @ Husaini (Attorney General's Chambers) for the respondent.

C Azman Abdullah JCA:

INTRODUCTION

D [1] This is an appeal by Mohd Hafiz bin Mohamad ('the appellant' or 'the accused') against the decision of the High Court which found that the appellant was guilty of the charge and convicted under s 302 of the Penal Code and the appellant was sentenced to death.

E [2] At the beginning, the appellant filed appeal on conviction and sentence to this court. However, at the hearing on 12 October 2023, the appellant withdrew the appeal on conviction. We therefore struck out the appellant appeal on conviction and upheld the conviction by the High Court. We then
F proceeded to hear the appellant appeal on the sentence.

[3] After reading the written submissions filed, hearing both parties orally and perusing the records of appeal, we unanimously allowed the appeal on sentence. We applied our discretion provided under the Abolition of
G Mandatory Death Penalty Act 2023 (Act 846) which conferred on this court the discretion to impose either the sentence of death or sentence of imprisonment of not less than 30 years and not more than 40 years. We imposed 35 years imprisonment to the appellant with 12 strokes of whipping.

H THE PROSECUTION CASE

[4] The charge against the appellant reads as follows:

I Bahawa kamu pada 16 Oktober 2016, jam lebih kurang 11.39 pagi, bertempat di parkir hadapan Pejabat Agama Daerah Kuala Terengganu, Kompleks Seri Iman, di dalam Daerah Kuala Terengganu, di dalam Negeri Terengganu Darul Iman, telah melakukan bunuh dengan menyebabkan kematian terhadap Muhamad Shukri bin Husin (No K/P: 820918-03-6159) dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan

- [5] The learned High Court judge ('HCJ') had outlined the material facts of prosecution case in his grounds of judgment which we respectfully adopt them with modification whenever necessary. The relevant facts, as found by the learned HCJ, was that the appellant had killed the deceased who was the brother of SP18. The appellant was said to have special relationship with SP18. A
- [6] On the 16 October 2016, the appellant together with SP18 and her family members including the deceased and SP17 went to the religious office at the Kompleks Seri Iman Kuala Terengganu to check on the appellant marital status. The religious office confirmed that the appellant was a married man since 2010. B
- [7] At the parking lot, SP18 and SP17 saw from 30 metres that the appellant stabbed the deceased with a butcher knife. The facts showed that the appellant went to the religious office with his friend, SP21. According to SP21, the appellant brought a paper bag together with him when they left for the religious office. The paper bag was placed at the foot of the front passenger seat. C
- [8] SP21 only became aware of the knife when the appellant was about to use the knife to stab the deceased after taking it from the paper bag. SP21 tried to stop the appellant but failed as the appellant was stronger than him. D
- [9] After the killing, the appellant met SP19 and told him about the incident. The appellant then asked SP19 to keep the knife. On 18 October 2016, SP19 handed over the knife to the police. E
- [10] SP13 raided the appellant house and seized the appellant clothes, namely the shirt and trousers worn on the day of the incident. The clothes were sent to the Malaysian Chemistry Department for analysis and it was found that there were blood stains on the pants which contained the deceased's DNA. F
- [11] The appellant was arrested approximately three days after the incident which was on 19 October 2016. G
- [12] The results of the autopsy conducted by SP16 on the deceased disclosed that the cause of death was the stab wounds to the chest. SP16 found five stab wounds, two slash wounds and six incision wounds inflicted on the deceased. The wounds suffered are very severe, that is, the main blood vessels of the heart and respiratory tract were cut. H
- [13] As the appeal on conviction was withdrawn, we will not discuss the findings of the learned HCJ at the end of prosecution case and at the end of the I

A defence case. We will now direct our grounds to the issue on sentence in which we commute from the sentence of death penalty to the sentence of imprisonment.

SENTENCE

B

[14] The abolition of death penalty is still new in the Malaysian hemisphere. Hitherto, the issue on whether to mete the sentence of hanging to death out or to sentence for imprisonment still remain unsettled. However, we cannot resist the changes. Lord Denning LJ in a locus classicus case of *Packer v Packer* [1953] 2 All ER 127 stated that 'If we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on, and that will be bad for both'.

C

D [15] All in all, it is the duty of the court to have regard to justice. In considering what is the appropriate sentence to be passed, we do consider all the necessities. We have examined whether there is a prospect for not imposing the death penalty and to what extent should we consider the accused rights of life. We have considered the seriousness of the offence committed and element of intention with lethal or other extreme factors.

E

[16] We appreciate the decision of Justice Vazeer Alam Mydin Meera JCA in the case of *Alowonle Oluwajuwon Gilbert v Public Prosecutor* [2023] MLJU 2628 when he summed up on when to impose the sentence of death as follows:

F

It can be gleaned from the cases discussed in the preceding paragraphs that the sentence of death has been imposed where the murders committed were extremely savage, heinous, diabolical, gruesome, cruel, horrendous or brutal and which shocks not only the judicial conscience but even the collective conscience of the society. As a broad guideline, it is our view, that the death penalty would be justified in dealing with, among others, hired and serial killers, those who rape and kill their victims for purposes of sexual gratification, dismember the bodies of their victims, dangerous criminals who use firearms, and those who plan a murder and execute it in a cold-blooded manner.

G

H [17] Therefore, after considering the facts of the case by the prosecution and the defence put forward by the appellant, we were of the considered view that the circumstances of the present case did not warrant the imposition of the death penalty.

I

[18] In this present appeal, even though the deceased suffered multiple stab wounds to the chest, evidence from SP21 stated that there was a quarrel between the appellant and the deceased before the appellant took the knife and stabbed the deceased. This negated the element of premeditated murder although the appellant brought with him a knife, but the knife was placed in

the car. There was no evidence that the appellant had used any force to bring the deceased near the car. We believe, that the appellant was about to leave the place when this unfortunate event happened.

CONCLUSION

[19] In the upshot, we allowed the appeal on sentence. The conviction by the High Court was affirmed but the sentence of death by hanging was set aside. It was our unanimous decision that a sentence of imprisonment of 35 years together with 12 strokes of whipping would be appropriate.

Appeal allowed and death sentence by hanging set aside.

Reported by Ashok Kumar

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Document (1)

1. [Alowonle Oluwajuwon Gilbert v Public Prosecutor \[2023\] MLJU 2628](#)

Client/Matter: -None-

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 [Alowonle Oluwajuwon Gilbert v Public Prosecutor \[2023\] MLJU 2628](#)

Malayan Law Journal Unreported

COURT OF APPEAL (PUTRAJAYA)

VAZEER ALAM MYDIN MEERA, AHMAD ZAIDI IBRAHIM AND SM KOMATHY SUPPIAH JJCA

CRIMINAL APPEAL NO B-05-260-08 OF 2021

22 November 2023

Afifuddin Ahmad Hafifi (Salehuddin Saidin & Assoc) for the appellant.

Sarulatha a/p Paramavathar (with Eyu Ghim Siang) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

SM Komathy Suppiah JCA:

JUDGMENT OF THE COURT

INTRODUCTION

[1] The accused, a Nigerian national, was charged with the murder of one Siti Kharina binti Kamarudin (“the deceased”) under [section 302](#) of the [Penal Code](#). The Shah Alam High Court found him guilty and convicted him, and sentenced him to **death** by hanging. He appealed to us against his conviction and sentence.

[2] The charge against him reads:

“Bahawa kamu pada 9 Mei 2019 jam lebih kurang 12.41 pagi hingga 15 Mei 2019 jam lebih kurang 2.30 petang bertempat di Tower 1, 09- 01, Third Avenue Condominium, Cyberjaya di dalam daerah Sepang dalam negeri Selangor Darul Ehsan, telah melakukan bunuh dengan menyebabkan kematian ke atas Siti Kharina binti Kamarudin (No. K/P: 780919-05-5024). Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah [seksyen 302 Kanun Keseksaan](#).”

[3] On 9 August 2023, we dismissed the appellant’s appeal against conviction but allowed his appeal on sentence by commuting his **death** sentence and substituting it with a sentence of imprisonment for 35 years and 12 strokes of the cane. In this judgment, we are only dealing with the issues relevant to the appropriate sentence.

Relevant Facts

[4] The relevant facts, as found by the trial judge, can be briefly summarised. The deceased was a nurse. At the material time, she was renting an apartment at Third Avenue Condominium in Cyberjaya. Sometime soon after midnight, to be specific, at about 12.37 am on 9 May 2019, she and the appellant got into the lift of the rented apartment to go up to her unit.

[5] The appellant was seen leaving the premises around 7.00 am that same morning. The deceased who was supposed to report for work later that evening, did not show up. In fact, no one had seen or heard from her after the 12.37 am on 9 May 2019.

[6] Some six days later, on 15 May 2019, the naked body of the deceased was found on the bedroom floor of the apartment by her landlady. The deceased was covered in blood and had 17 injuries, namely bruises, cuts and slash

wounds to her chest, neck and head. The appellant was arrested and charged with her murder when her blood was found on the shirt he had worn in the early hours of 9 May 2019.

[7] The appellant denied killing her, and his defence at the trial was one of alibi. His defence was rejected and the trial judge convicted and sentenced him to **death** as at the material time, the **death penalty** was the only sentence that could be imposed upon a conviction of an offence of murder under [section 302](#) of the [Penal Code](#).

Sentence

[8] We now give our reasons for commuting the sentence of **death** imposed on him by the High Court and substituting it with imprisonment for 35 years and 12 strokes of the cane.

[9] Until recently, the **death** sentence was the mandatory punishment prescribed by law for the offence of murder under [section 302](#) of the [Penal Code](#). Thus, there was one sentence only which could be judicially pronounced upon a person convicted of murder, and that was sentence of **death**. It was the only sentence the court could impose in every conviction of murder, regardless of any mitigating circumstances. The Court was not given any discretion regarding the sentence to be imposed for an offence of murder.

[10] However, on 4 July 2023, the mandatory **death penalty** for murder under [section 302](#) of the [Penal Code](#) was amended when the Abolition of **Death Penalty** Act (Act 846), came into force. The effect of the amendment was to convert the mandatory **death penalty** into a discretionary **death penalty**. This means that it is now no longer incumbent on the Court to impose the **death penalty** to everyone convicted for murder. Not every convicted murderer becomes a candidate for the **death** sentence. It is easy to discern the reason for this amendment. All killings which satisfy the definition of murder are by no means equally heinous. The factual circumstances surrounding murders differ so greatly from each other that it is wrong that they should all attract the **death penalty**.

[11] [Section 302](#), as amended, is reproduced in its entirety;

*"Whoever commits murder shall be punished with **death** or imprisonment for a term of not less than 30 years but not exceeding 40 years and if not sentenced to **death**, shall also be punished with whipping of not less than 12 strokes."*

[12] It is to be noted that when the amendment was debated in parliament, the Deputy Minister of Law had stated;

"Dengan pemberian budi bicara kepada mahkamah dalam menjatuhkan hukuman mati, mahkamah boleh mengambil kira prinsip undang-undang yang terpakai dalam memutuskan sama ada hukuman mati perlu dikenakan iaitu antara lain terdapat anggapan yang memihak kepada hak seseorang untuk hidup yang tidak terbatas, dengan izin unqualified right to life. Pertimbangan prinsip seterusnya adalah di mana hukuman mati boleh dikenakan dalam kes-kes yang sesuai dan mahkamah mempunyai peranan untuk menentukan kes-kes yang sesuai tersebut berdasarkan antara lain precedent ataupun dahuluhan di dalam kes-kes serupa di negara-negara lain seperti India yang juga telah pun menghapuskan hukuman mati mandatori. Prinsip-prinsip yang harus dipertimbangan termasuk factor-faktor mitigasi dan pemberatan ataupun dengan izin, mitigating and aggravating factors,"

[13] We are of the view that the change in law, conferring the Court the discretion to impose either the sentence of **death** or sentence of imprisonment of not less than 30 years and not more than 40 years is intended to reserve the sentence of **death** for the more serious and exceptional murders. Unfortunately, there are no explanations or illustrations to [s.302](#) of the [Penal Code](#) to indicate the factors which the judge is to take into account in determining whether or not to impose the **death penalty**. Looking at the provision, we are of the view that the legislative purpose of the amendment is intended to make the sentence of imprisonment of 30 to 40 years the rule for an offence of murder and to limit the sentence of **death** for the most exceptionally serious, foul, shocking murders that are callous to an almost unbelievable degree.

[14] Many countries in the world have abolished the **death penalty**. In some, like in Malaysia, a judicial discretion to impose the **death penalty** for an offence of murder has been conferred, reserving its imposition for the most serious cases. India too converted the mandatory **death penalty** for an offence of murder into a discretionary **death penalty** several decades ago. [Section 302](#) of the [Indian Penal Code](#) reads:

*"Whoever commits murder shall be punished with **death** or imprisonment for life, and shall also be liable to fine."*

[15] We find support for the view we have expressed (at [12]), in the judgments of the Indian Supreme Court that have interpreted [section 302](#) of the [Indian Penal Code](#). It has been held that the sentence of **death** is to be imposed

only in the rarest of rare cases where reform is not possible - see the decisions of *Bachan Singh v. The State of Punjab* (1980) 2 SCC 684; 1980 CrL LJ 636, *Machhi Singh and others v. State of Punjab* (1984) 1 MLJ (CrL) 95 and *Deepak Rai vs State of Bihar* [2013] 4 MLJ (CrL) 171.

[16] In *Machhi Singh*, the Indian Supreme Court laid down five factors to be considered by the court in exercising its discretion to impose the **death penalty** as punishment for murder, and they are:

1. Manner as to how the murder was committed;
2. The motive for commission of the murder;
3. The nature of the crime;
4. Magnitude of the crime; and
5. The personality of the victim.

The Court also referred to its earlier decision in **Bachan Singh** and held that:

*"(i) The extreme **penalty of death** need not be inflicted except in gravest cases of extreme culpability;*

*(ii) Before opting for the **death penalty**, the circumstances of the offender also require to be taken into consideration along with the circumstances of the crime;*

*(iii) Life imprisonment is the rule and **death** sentence is an exception. In other words, **death** sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regards to the nature and circumstances of the crime and all the relevant circumstances;*

(iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercise."

[17] In **Deepak Rai Versus State of Bihar (supra)**, the Supreme Court observed;

*The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of **death** only if there are special reasons for doing so... While considering the question of sentence to be imposed for the offence of murder under [section 302](#) of the [Penal Code](#), the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the **death** sentence... on conviction for murder and other capital offences punishable in the alternative with **death** under the Penal Code, the extreme **penalty** should be imposed only in extreme cases... the **death penalty** ought not to be imposed save in the rarest of rare cases when the alternative option is unquestionably foreclosed... This Court has consistently held that only in those exceptional cases where the crime is so brutal, diabolical and revolting so as to shock the collective conscience of the community, would it be appropriate to award **death** sentence. Since such circumstances cannot be laid down as a straight jacket formula but must be ascertained from case to case, the legislature has left it open for the Courts to examine the facts of the case and appropriately decide upon the sentence proportional to the gravity of the offence."*

[18] And closer to home, the Federal Court in *Loh Hock Seng v Public Prosecutor* [1980] 2 MLJ 13, in relation to the exercise of sentencing discretion where the alternative sentences of **death** or life imprisonment were available for a conviction for trafficking in dangerous drugs, observed as follows:

*"Sentencing in a criminal case must of course bear relation to the particular circumstances of the offender as well as the particular circumstances of the offence. The legislature has in its wisdom and in the implementation of its plenary powers in this respect enacted the imposition of the alternative **penalties of death** or imprisonment for life under [section 39B](#) of the Ordinance with the option and discretion in this regard to be no doubt judicially and judiciously exercised according to the facts and circumstances of a particular case, and we can see no reason whatsoever why the statutory enactment of the option for punishment by **death** cannot and should not be made functionally operative and exercised and applied proprio vigore if the circumstances and facts of the case so warrant, justify, require and perhaps even demand."*

[19] It cannot be gainsaid that the determination, as to what would constitute an exceptional murder warranting the death penalty, is a difficult task. In this regard it would be of assistance to examine other Indian cases for some guidance as the type of murder cases that have attracted the death penalty on the basis they have come under the "rarest of rare" category.

[20] In *Holiram Bordoli v State of Assam* (2005) 3 SCC 793, the accused persons were armed with lathis, and various other weapons. They went to the house of the victim and started pelting stones on the bamboo wall of the victim's house. They then closed the house from the outside and set it on fire. When the son, daughter and the wife of the victim managed to escape, the accused persons caught hold of them and threw them into the fire again. Thereafter the victim's elder brother who was staying in another house at some distance from the house of the victim was caught and dragged to the courtyard of the accused where the accused cut him into pieces. The evidence showed that the accused was the leader of the gang, and the offence was committed in the most barbaric manner to deter others from challenging the supremacy of the accused in the village. It was held that there was absence of any strong motive and the Supreme Court held that the trial court was justified in imposing death sentence as the victims had not provoked or contributed to the incident. It was further held the sentence of death was the most appropriate punishment, there being aggravating circumstances and no mitigating circumstance.

[21] In the case of **Suresh v State of Uttar Pradesh AIR 2001 SC 1344**, the accused murdered his brother and the latter's family members including minor children at night when they were fast asleep with an axe and chopper by cutting their skulls and necks for a piece of land. It was held that the murder of the innocent victims was a grotesque and diabolical act, where any other punishment than the death penalty was unjustified.

[22] In *Molai v State of Madhya Pradesh AIR 2000 SC 177* the jail officer sent a guard and a prisoner to work in his house. The 16-year-old daughter of the said officer was at that time alone in the quarters and was preparing for her class examination. The guard and the prisoner raped her, strangled her and stabbed her. Thereafter, they threw her dead body into a septic tank to hide their crime. The court held that death was a fit punishment for the brutal murder of a young person.

[23] In *Ramdeo Chauhan v. State of Assam, AIR 2000 SC 2679*; : (2000) 7 SCC 455, in order to commit theft, the accused killed four occupants of a house including two helpless women and a child aged 2 years whilst they were asleep. The accused also attacked another occupant of the house, an old woman, and a neighbour with a spade when they entered the house. The Court held that the young age (22 years) of the accused at the time of committing the crime was not a mitigating circumstance, and death penalty was a just and proper punishment.

[24] In *Ravji v. State of Rajasthan* , AIR 1996 SC 787; : (1996) 2 SCC 175; : LNIND 1995 SC 1247, the accused killed his wife and three minor children while they were asleep. When his mother intervened, he injured her with an axe with the intention of killing her. He then proceeded to the neighbour's house and attempted to kill his neighbour's wife who was also asleep. When his neighbour intervened, he killed him too and fled from the scene. The court held that the death sentence was the appropriate punishment as the accused had a solemn duty to protect his family members but he betrayed the trust reposed in him in a very cruel and calculated manner without any provocation whatsoever.

[25] In **Deepak Rai Versus State of Bihar** ([14] supra), the accused murdered the complainant's wife and 5 children when the latter refused to withdraw a report he had lodged against the former. He killed them by setting fire to their house. The Court stated that the death sentence imposed on the accused was justified as he had killed the young, innocent children and wife of the complainant by burning them alive simply because the complainant had refused to withdraw the report.

[26] It can be gleaned from the cases discussed in the preceding paragraphs that the sentence of death has been imposed where the murders committed were extremely savage, heinous, diabolical, gruesome, cruel, horrendous or brutal and which shocks not only the judicial conscience but even the collective conscience of the society. As a broad guideline, it is our view, that the death penalty would be justified in dealing with, among others, hired and serial killers, those who rape and kill their victims for purposes of sexual gratification, dismember the bodies of their victims, dangerous criminals who use firearms, and those who plan a murder and execute it in a cold-blooded manner.

[27] Having considered what kind of murder cases that deserve the death sentence, we now revert to the factual position in this case. The question arises whether any of the factors in the present case warrant the Court affirming the imposition of the death penalty. In mitigation, the appellant urged the Court to set aside the death sentence

and impose imprisonment he was 40 years of age now, this was his first offence, and that he be given a chance to reform. According to the appellant, he and the deceased were in a relationship and were planning to get married and start a business in Nigeria. He had no intention to kill her.

[28] On the other hand, the learned deputy contended that the murder committed by the appellant was a brutal one as the deceased had 17 injuries on her body and had died from the slash wound to the neck. She therefore urged the court to maintain the death sentence.

[29] The burden is upon the prosecution to make out a case for imposition of the death penalty. It is trite that in determining the nature of the sentence, the court must balance the aggravating and mitigating factors of the case. The examples of factors which are relevant to aggravation are premeditation and planning, the use of prolonged or savage violence, and the use of a firearm. Other examples would include where the murderer has sought to evade detection by disposing, concealing or dismembering the body of his victim and killing the victim for money.

[30] Mitigating factors that may be relevant to the offence of murder include-an intention to cause serious bodily harm rather than to kill, lack of premeditation, evidence that the murderer suffered from mental disorder or mental disability, the fact that the murderer was provoked and murders arising from sudden quarrels within a family, or between neighbours, or in the heat of passion.

[31] In the instant case, there was no evidence that the appellant had pre-planned to attack the deceased or had any motive to kill her. The couple had come back to the apartment just after midnight. In fact, the CCTV footage of them getting into the lift showed that all appeared to be well and normal between them. They were standing close to each other. The circumstances preceding the killing, suggests that a sudden misunderstanding occurred between them sometime in the early hours of 9 May 2019, which resulted in her being killed. In fact, blood stains carrying the appellant's DNA profile was found together with the deceased's blood at the scene of the incident, suggesting that there was a fight/ quarrel between them. This would negate any suggestion that it was a cold blooded premeditated murder by the appellant. It is true that the deceased was killed in a brutal manner. The brutality of the manner in which the deceased was killed is a relevant consideration but not the sole criterion for deciding whether the death sentence is warranted.

[32] On these facts, and keeping in mind that the judicial discretion to impose the death penalty has been conferred, reserving its imposition for the most heinous and most exceptional cases, we are of the view that the circumstances of the present case, does not warrant the imposition of the death penalty. It is true that an innocent victim has lost her life, but if the legislative purpose of [section 302](#) is ignored and the death sentence is continued to be imposed on every person convicted of murder, it would render the change in law redundant.

CONCLUSION

[33] Taking into account that the killing of the deceased was not pre planned, as well as the fact that the appellant was a first time offender and that the prosecution had not produced any evidence to show that he was a hardcore criminal incapable of reform and rehabilitation and was a continuing threat to the society, it was our view, that a sentence of imprisonment of 35 years together with 12 strokes of the cane would be appropriate.

**DALAM MAHKAMAH RAYUAN MALAYSIA DI PUTRAJAYA
(BIDANG KUASA RAYUAN)
[RAYUAN JENAYAH NO: NO. B-05(M)-410-09/2022]**

ANTARA

VASUTHEVAN PALANIAPPAN

... PERAYU

DAN

PENDAKWA RAYA

... RESPONDEN

Dalam Mahkamah Tinggi Malaya di Shah Alam
Dalam Negeri Selangor Perbicaraan Jenayah No:BA-45B-2-01/2018

Antara

Pendakwa Raya

... Perayu

Dan

Vasuthevan Palaniappan

... Responden

KORAM:

**VAZEER ALAM MYDIN MEERA, HMR
AHMAD ZAIDI IBRAHIM, HMR
AZMI ARIFFIN, HMR**

PENGHAKIMAN

Mukadimah

[1] Pertuduhan terhadap Perayu di Mahkamah Tinggi Shah Alam, Selangor Darul Ehsan adalah seperti berikut:

“Bahawa kamu bersama-sama dengan seorang lagi yang telah meninggal dunia pada 27 Februari 2016 bernama Thavaselvan a/l Kandiah [No. KP: 841104-14-6255] pada 7 Mei 2015

antara jam lebih kurang 8.30 pm hingga 8.40 pm bertempat di dalam rumah flat unit no. 302, Tingkat 3, Blok 7, Jalan Nelayan 19/15, Seksyen 19, Shah Alam, dalam Daerah Petaling, dalam Negeri Selangor Darul Ehsan, bagi mencapai niat bersama kamu berdua, telah melakukan bunuh dengan menyebabkan kematian ke atas Thanendran a/I Muniandy (No. KP: 850901-14-6367) dan oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun yang sama.”

- [2] Di akhir kes pendakwaan, hakim bicara yang bijaksana mendapati pihak pendakwaan telah berjaya mengemukakan suatu kes *prima facie* terhadap Perayu dan Perayu dipanggil untuk membela diri.
- [3] Perayu telah memberikan keterangan secara bersumpah. Tiada saksi pembelaan lain yang dipanggil oleh Perayu.
- [4] Di akhir kes pembelaan, hakim bicara yang bijaksana mendapati Perayu telah gagal untuk menimbulkan keraguan yang munasabah terhadap kes pendakwaan. Sebaliknya, hakim bicara yang bijaksana mendapati bahawa pihak pendakwaan telah berjaya membuktikan kesnya melampaui keraguan yang munasabah.
- [5] Justeru itu, pada 15/9/2022 Perayu telah didapati bersalah di bawah seksyen 302 Kanun Keseksaan dibaca bersama seksyen 34 Kanun yang sama dan Perayu dijatuhi hukuman gantung sampai mati.
- [6] Tidak berpuashati dengan keputusan tersebut, pada 20/9/2022, Perayu telah menfailkan rayuan terhadap sabitan dan hukuman di Mahkamah Rayuan bagi memohon agar keputusan hakim bicara tersebut diketepikan.
- [7] Rayuan Perayu telah didengar di hadapan kami pada 13/12/2023. Sabitan terhadap Perayu kami kekalkan. Namun hukuman gantung sampai mati kami ketepikan dan digantikan dengan hukuman

pemenjaraan selama 35 tahun dari tarikh tangkap (15/7/2017) dan 12 kali sebatan.

- [8] Tidak berpuashati dengan keputusan tersebut, pada 19/12/2023 Perayu telah menfailkan rayuan terhadap keseluruhan keputusan kami di Mahkamah Persekutuan.

Fakta Kes Pendakwaan

- [9] Fakta kes yang dikemukakan oleh pihak pendakwaan telah diringkaskan oleh hakim bicara yang bijaksana di dalam alasan penghakimannya dengan sedikit pengubahsuaian.

“[7] Pihak pendakwaan telah memanggil seramai 15 orang saksi pendakwaan semasa kes pendakwaan. Fakta kes pendakwaan boleh diringkaskan seperti berikut:

- (i) Menurut keterangan SP1 (saksi mata) pada 7 Mei 2015 jam lebih kurang 7.00 malam, beliau sedang tidur di ruang tamu flat rumah Thanendran (simati). Simati juga dipanggil “Tamiya”. SP1 dan simati adalah kawan baik dan SP1 menumpang tinggal di rumah simati sejak April 2015. Hanya SP1 dan simati sahaja yang tinggal di rumah simati.*
- (ii) Kakak simati (SP7) dan kawan-kawan simati seperti Thavaselvan juga dipanggil (“Selvam”) dan Pirabu pernah datang ke rumah simati. SP1 juga mengenali Selvam dan Pirabu. Thavaselvan @ Selvam ialah saspek yang telah meninggal dunia pada 27 Feb 2016 (selepas ini akan dirujuk sebagai “Selvam”).*
- (iii) Pada hari kejadian, SP1 sedang tidur di ruang tamu rumah simati dan tiba-tiba terdengar bunyi langkah yang kuat dan telah dikejutkan oleh Selvam yang telah meletakkan kakinya di leher SP1 dan mengacukan pisau*

ke arah muka SP1. Semasa itu, SP1 juga nampak seorang lagi lelaki India yang tidak dikenali (kemudiannya dikenalpasti sebagai “tertuduh”) telah mencekik simati dan mengacukan pisau yang dipegangnya ke arah simati di ruang dapur rumah simati.

- (iv) SP1 terdengar tertuduh yang mencekik simati berkata “kamu perlu masuk ke dalam kain ibu kamu” dan tiba-tiba SP1 melihat darah keluar dari tubuh simati. Semasa itu, SP1 melihat simati tidak memakai baju dan hanya berseluar jeans. SP1 juga melihat tompokan darah di bahagian antara pusat dan bawah mata simati. Semasa itu, pencahayaan dalam ruang tamu rumah simati adalah terang dan lampu dibuka.*
- (v) SP1 terdengar simati menjerit “aaa” sebanyak dua kali dan juga SP1 nampak banyak darah keluar daripada tubuh simati. SP1 nampak tertuduh bergaduh dengan simati dan tertuduh telah menghiris atau memotong simati menggunakan pisau tersebut.*
- (vi) SP1 juga nampak Selvam telah menggunakan pisau yang dipegangnya untuk menghiris atau memotong simati. SP1 juga terdengar tertuduh menyuruh Selvam untuk membunuh SP1. Berikutan itu, SP1 telah merayu kepada Selvam supaya tidak membunuhnya kerana mereka telah berkawan sejak kecil dan SP1 berhasrat untuk berkahwin tidak lama lagi. Rayuan SP1 telah diterima oleh Selvam dan SP1 tidak dcederakan oleh Selvam atau tertuduh.*
- (vii) Selvam telah menyuruh SP1 yang pada ketika itu tidak berbaju masuk ke bilik kedua untuk memakai baju dan seluar. Semasa SP1 keluar dari bilik kedua tersebut, SP1 nampak simati terbaring di atas lantai bilik air rumah simati dalam keadaan berlumuran berdarah. SP1 telah*

disuruh oleh Selvam untuk mengikut tertuduh dan Selvam keluar dari rumah simati dan semasa mereka keluar dari rumah simati, Selvam berada di hadapan SP1 dan tertuduh pula berada di belakang SP1. SP1 telah diapit oleh tertuduh dan Selvam.

- (viii) SP1 tidak berani dan tiada peluang untuk melarikan diri semasa kejadian kerana takut ditangkap oleh tertuduh dan Selvam dan jika ditangkap, SP1 percaya akan dcederakan oleh mereka berdua. Semasa keluar dari rumah simati, SP1 nampak tertuduh memegang pisau dan parang.*
- (ix) Menurut SP1, semasa kejadian tertuduh memakai baju kemeja warna biru corak petak besar dan seluar jeans (tidak pasti samada warna hitam atau biru). Selvam pula memakai jaket warna hitam berzip dengan seluar jeans (tidak pasti samada warna hitam atau biru). Terdapat tompokan atau percikan darah pada baju yang dipakai oleh tertuduh dan Selvam.*
- (x) SP6 (jiran simati) yang tinggal di rumah No. 310 (selang dua rumah dari rumah simati) pada malam kejadian telah diberitahu oleh emak mertuanya yang terdengar bunyi pergaduhan datang dari rumah simati. SP6 yang mengenali simati dan juga SP1 (yang menumpang rumah simati) telah keluar dari rumahnya untuk melihat keadaan rumah simati dan tidak melihat apa-apa pergaduhan tetapi terdengar bunyi televisyen yang kuat dari rumah simati.*
- (xi) Selepas itu SP6 masuk semula ke dalam rumahnya dan memberitahu emak mentuanya tiada apa-apa pergaduhan. Selepas itu semasa SP6 sedang makan malam, SP6 berasa tidak sedap hati dan berdiri di hadapan pintu gate*

rumahnya sambil melihat kiri dan kanan. Semasa melihat kiri dan kanan dari hadapan pintu gate rumahnya, SP6 nampak tiga orang lelaki berbangsa India keluar dari rumah simati. Daripada tiga lelaki India yang keluar dari rumah simati, SP6 hanya mengenali SP1.

- (xii) SP6 juga dapat mengenali tertuduh yang memakai baju warna biru corak kotak semasa tertuduh keluar dari rumah simati. SP6 telah melihat muka tertuduh selama beberapa minit dan semasa tertuduh memandang menghala tangga bersebelahan rumah SP6. Manakala lelaki India yang ketiga tidak dapat dicam oleh SP6. Jarak rumah SP6 dengan rumah simati adalah dua buah rumah dan SP6 boleh melihat sampai ke rumah simati. Sebab itu SP6 dapat melihat muka tertuduh semasa itu. Semasa itu juga SP6 menyatakan cahaya lampu terang di luar rumah.*
- (xiii) SP6 juga nampak tertuduh memegang sebilah parang yang dibalut dengan kertas di tangannya semasa tertuduh keluar dari rumah simati bersama SP1 dan lelaki India yang ketiga tersebut. SP6 dapat mengenali tertuduh semasa sesi kawad cam dan juga semasa perbicaraan di mahkamah di mana SP6 mengesahkan tertuduh yang memakai baju warna biru corak kotak dan memegang sebilah parang semasa keluar dari rumah simati.*
- (xiv) Selepas tertuduh, SP1 dan lelaki India ketiga tersebut meninggalkan rumah simati, SP6 dan anak-anaknya telah pergi ke rumah simati dan melihat pintu gate rumah simati tidak berkunci dan pintu rumah terbuka sedikit, telah masuk ke dalam rumah simati. Setelah SP6 dan anak-anaknya masuk ke dalam rumah simati, SP6 melihat ruang tamu rumah simati berlumuran darah dan juga*

melihat kesan tapak kaki berdarah di dalam rumah simati.

- (xv) Semasa mencari simati, SP6 nampak bahagian kaki dan badan simati di dalam bilik air. Ini menyebabkan SP6 berasa ketakutan, menangis, menjerit dan lari keluar dari rumah simati. SP6 juga melihat bilik air berlumuran darah dan bercampur dengan air. SP6 yang berlari keluar balik ke rumahnya telah menelefon Mohana kakak simati (SP7) dan memberitahu SP7 berlaku pergaduhan melibatkan simati dan simati telah ditetak.*
- (xvi) Selepas menelefon SP7, SP6 dan anak-anaknya telah pergi semula ke rumah simati dan melihat air mengalir di bilik air bercampur dengan darah simati. Salah seorang anak SP6 telah menutup paip air di bilik air. SP6 dan anak-anaknya telah mengangkat simati keluar dari bilik air dan meletakkan simati di luar bilik air (bersebelahan dengan peti ais) di ruang dapur. Semasa mengangkat simati, SP6 melihat banyak kesan tetakan di badan simati.*
- (xvii) Selepas itu SP6 dan anak-anak SP6 telah keluar dari rumah simati dan terserempak dengan jiran (SP9) di hadapan rumah simati dan SP6 meminta SP9 masuk ke dalam rumah simati dan memeriksa simati yang ditetak samada masih hidup atau sebaliknya. SP9 (penghuni rumah no. 308) yang masuk ke dalam rumah simati nampak beberapa titisan darah di ruang tamu rumah dan nampak simati terbaring di atas lantai dalam keadaan kesan kelar di leher dan beberapa kesan lagi di badan dan perut simati.*
- (xviii) SP9 juga nampak terlalu banyak darah di atas dapur, di dinding dan di bilik air rumah simati. SP9 telah*

memegang pergelangan tangan simati untuk memeriksa nadi simati dan mendapati tiada denyutan jantung dan simati telah meninggal dunia. Semasa SP9 memeriksa simati, simati hanya berseluar tanpa baju. SP6 pula berada di belakang SP9 semasa SP9 memeriksa nadi simati. Selepas itu, SP9 telah membuat panggilan kecemasan no. 112 dan dijawab oleh operator. SP9 memaklumkan terdapat satu kejadian bunuh dan telah disambungkan kepada pihak polis (SP2). SP9 telah maklumkan pihak polis ada seorang lelaki India telah mati di alamat tersebut. [lihat P10 dan P51].

- (xix) SP7 (kakak mangsa) telah datang ke rumah simati pada malam kejadian setelah mendapat panggilan telefon daripada SP6 yang memaklumkan simati telah ditetak. SP7 menyatakan SP1 menumpang rumah simati sejak April 2015 dan SP1 dan simati selalu bersama. SP7 juga mengenali SP1 sebagai kawan baik simati. Semasa SP7 tiba di rumah simati, SP7 melihat simati terbaring di atas lantai berdekatan dengan peti ais dengan tidak berbaju dan hanya berseluar serta dalam keadaan berlumuran darah.*
- (xx) Menurut SP1, selepas keluar dari rumah simati, ketiga-tiga mereka iaitu tertuduh, Selvam dan SP1 telah turun ke bawah flat dan SP1 nampak sebuah kereta Iswara warna kelabu berhenti di situ. Ketiga-tiga mereka telah menaiki kereta Iswara tersebut dan SP1 duduk di tengah bahagian penumpang belakang manakala tertuduh duduk di sebelah kiri SP1 dan Selvam di sebelah kanan SP1.*
- (xxi) Menurut SP1, kereta Iswara tersebut dipandu oleh seorang lelaki yang tidak kenali dan juga terdapat seorang lagi lelaki yang tidak dikenali oleh SP1 duduk di bahagian penumpang hadapan (di sebelah pemandu).*

Kereta Iswara tersebut telah dipandu oleh lelaki tersebut ke sebuah kuil Hindu. Tiba di kuil tersebut, kesemua mereka telah turun keluar dari kereta Iswara tersebut dan SP1 nampak tertuduh dan Selvam pergi ke sebelah tepi kuil tersebut. Kemudian SP1 nampak tangan, kaki dan baju tertuduh dan Selvam basah macam baru dibasuh dengan air.

(xxii) Semasa berada di kuil tersebut, SP1 terdengar suara kuat tertuduh dalam keadaan marah mengeluarkan perkataan- perkataan kotor dalam bahasa Tamil dan semasa perbicaraan, SP1 telah menulis semula perkataan-perkataan kotor yang disebutkan oleh tertuduh semasa di kuil tersebut [lihat P 11].

(xxiii) SP12 (seorang sami kuil) pada jam lebih kurang 10.00 malam yang sama, semasa hendak menutup kuil tersebut, telah nampak lima orang lelaki India datang ke kuil tersebut. Salah seorang lelaki India tersebut dengan tergesa-gesa telah bertanya kepada SP12 di mana paip air. SP12 memberitahu lelaki India tersebut bahawa paip air di belakang kuil tersebut. Selepas itu, lelaki India tersebut dan dua lagi lelaki India tersebut masuk ke perkarangan kuil untuk mencari paip air. Manakala dua lagi lelaki India tersebut duduk di dalam kereta.

(xxiv) SP12 yang mengenali SP1 nampak SP1 duduk di dalam kereta semasa di kuil tersebut. SP12 juga dapat mengesahkan SP1 semasa perbicaraan kes. SP12 dapat mengesahkan lelaki India yang berjumpa dengan SP12 bertanyakan mengenai paip air dan juga lelaki India yang kali pertama memaki-hamun Tuhan Hindu semasa di kuil. Lelaki India tersebut telah memaki-hamun Tuhan Hindu dengan cara ganas dan ini menakutkan SP12. Menurut SP12, lelaki India tersebut adalah tertuduh.

SP12 juga dapat mengecam tertuduh semasa perbicaraan di mahkamah.

(xxv) SP12 masih dapat mengecam wajah tertuduh yang datang ke kuil tersebut pada malam kejadian kerana sebelum ini tidak pernah ada penganut agama Hindu yang datang ke kuil tersebut telah memaki-hamun Tuhan Hindu. Tertuduh merupakan satu-satunya penganut Hindu yang berbuat sedemikian dan disebabkan itu, wajah tertuduh sukar dilupakan dan masih diingati oleh SP12.

(xxvi) Menurut SP1, selepas mereka beredar dari kuil tersebut menaiki kereta Iswara tersebut, mereka telah pergi ke Taman Sri Subang dan SP1 telah turun dari kereta tersebut. Selepas itu, kereta tersebut telah beredar dari situ bersama tertuduh, Selvam dan dua lagi lelaki India tersebut. Semasa tiba di sana, SP1 telah dilempang oleh Selvam di bahagian muka SP1 dan Selvam memberi amaran kepada SP1 bahawa “apa-apa yang berlaku pandai-pandai tanggung”. SP1 yang berasa takut akibat kejadian yang menimpa simati telah memutuskan untuk pergi ke Johar Bahru pada esok harinya dengan menaiki bas ekpress.

(xxvii) SP1 juga telah mendapat panggilan telefon daripada kawan- kawannya seperti Pirabu dan Puneswaran yang bertanya apa yang telah berlaku dan SP1 memberitahu mereka bahawa simati telah dibunuh oleh tertuduh dan Selvam.

(xxviii) SP1 telah ditangkap oleh pihak polis di Bilik No. 111, Hanya Satu Hotel, Jalan Meldrum, Johar Bahru pada 9 Jun 2015 [lihat P71] dan telah dibawa oleh pihak polis ke IPD Shah Alam untuk direman dan telah berjumpa dengan pegawai penyiasat (SP15). Tertuduh pula telah

ditangkap oleh pihak polis pada 15 Julai 2017 di perkarangan IPD Kajang [lihat P75].

(xxix) SP13 telah menjalankan sesi kawad cam pada 21 Julai 2017 jam lebih kurang 11.05 pagi di Bilik Kawad Cam, Lokap Berpusat Shah Alam di mana tertuduh dapat dicam oleh SP1 [lihat P53]. SP1 juga dapat mengecam tertuduh semasa perbicaraan kes. Selanjutnya SP13 juga telah menjalankan sesi kawad cam pada 26 Julai 2017 jam lebih kurang 2.20 petang di Bilik Kawad Cam, Lokap Berpusat Shah Alam di mana tertuduh dapat dicam oleh SP6 [lihat P54]. SP6 juga dapat mengecam tertuduh semasa perbicaraan kes.

(xxx) SP1 mengenali dan dapat mengecam SP12 (sami kuil) semasa perbicaraan kes. SP1 menyatakan telah berjumpa dengan SP12 di kuil tersebut pada malam kejadian. SP1 juga mengakui pada awalnya telah dituduh di Mahkamah Majistret menyebabkan kematian simati tetapi pertuduhan terhadapnya tidak diteruskan oleh pihak pendakwaan dan SP1 telah dilepaskan dengan jaminan sebanyak RM10,000.00 dengan seorang penjamin (Saravanan a/I Govindersamy) pada 18 April 2016.

(xxxi) Keterangan SP5 (pakar perunding perubatan forensik) mengesahkan terdapat 25 kecederaan Luka hiris dan tetak pada tubuh simati di mana salah satu Luka tersebut adalah Luka yang paling bahaya (fatal in nature) iaitu Luka hiris pada tepi leher sebelah kiri yang telah mencederakan pembuluh darah jugular yang terdapat di bawahnya. Kecederaan serius ini menyebabkan simati kehilangan darah yang banyak sehingga menyebabkan kematian simati.

- (xxxii) Menurut SP5, Luka hiris dan tetak yang banyak pada tubuh simati boleh disebabkan oleh senjata tajam seperti pisau atau parang dan dilakukan oleh lebih daripada seorang penyerang. Luka hiris tersebut ialah hirisan tajam dan dilakukan bertalu-talu seperti yang terdapat di belakang leher simati. Simati boleh mati dalam masa 10 minit hingga 45 minit selepas cedera di leher.
- (xxxiii) SP5 juga menyatakan terdapat kecederaan-kecederaan pada tubuh simati yang menunjukkan simati cuba mempertahankan diri dan menangkis serangan daripada penyerang atau penyerang- penyerangnya. Dapatan SP5 menyokong keterangan SP1 yang menyatakan semasa kejadian SP1 nampak tertuduh dan Selvam yang menyerang dan menghiris atau memotong simati menggunakan pisau.
- (xxxiv) Setelah SP2 mendapat panggilan kecemasan daripada SP9, pihak polis telah tiba di rumah simati pada jam lebih kurang 9.30 malam dan pihak ambulan lebih kurang 10 minit selepas pihak polis tiba. Akibat kecederaan-kecederaan parah yang dialami simati serta simati kehilangan darah yang banyak, simati telah meninggal dunia di tempat kejadian pada 7 Mei 2015 antara jam lebih kurang 8.30 hingga 8.40 malam. Panggilan kecemasan oleh SP9 kepada pihak polis diterima oleh SP2 pada jam 9.08 malam.
- (xxxv) Hasil bedah siasat simati yang dilakukan oleh SP5 pada 8 Mei 2015 jam 10.00 pagi di Hospital Tengku Ampuan Rahimah, Klang mengesahkan sebab kematian mangsa ialah Luka hiris di leher (*incised wound to the neck*).
- (xxxvi) Siasatan oleh pegawai penyiasat (SP15) menunjukkan tertuduh dan Selvam yang terlibat secara bersama dalam

menyerang, menghiris atau memotong simati semasa kejadian sehingga menyebabkan kematian simati.”

Fakta Kes Pembelaan

- [10] Semasa kejadian pada 7/5/2015, Perayu berusia 27 tahun dan semasa perbicaraan Perayu berusia 34 tahun. Pada tahun 2015, Perayu bekerja sebagai pengendali jentera di Pulau Carey, Klang, Selangor. Perayu tidak mengenali Thanendran a/I Muniandy (si mati) atau SP1 (Panas).
- [11] Perayu ditangkap oleh pihak polis pada 20/6/2017 di Ibu Pejabat Polis Daerah Kajang, Selangor berkaitan kes pembunuhan ke atas si mati. Perayu telah direman oleh pihak polis dan tidak ingat bila dia dituduh di Mahkamah.
- [12] Mengikut Perayu, sesi kawad cam telah dijalankan oleh pihak polis adalah tidak mengikut prosedur standard yang ditetapkan di mana peserta-peserta kawad cam tidak mempunyai saiz fizikal dan ketinggian yang sama serta bukan kesemuanya berbangsa India.
- [13] Perayu mengenali Thavaselvan @ Selvam (suspek yang telah meninggal dunia) yang disebut di dalam pertuduhan di mana Thavaselvan adalah pakcik teman wanita Perayu.
- [14] Pada hari kejadian pada sebelah petang (tarikh tidak ingat), Perayu telah berjumpa dengan Thavaselvan di mana Thavaselvan ada meminta pertolongan Perayu untuk pergi bersamanya ke Sunway mengambil jam tangan, rantai dan duitnya kerana Thavaselvan tidak mempunyai pengangkutan untuk ke Sunway (alamat tidak tahu). Perayu bersetuju menolong Thavaselvan dan mereka berdua telah bertolak ke Sunway pada jam lebih kurang 6.00 petang (tarikh tidak ingat) dengan menaiki motorsikal Perayu.
- [15] Apabila mereka sampai di Sunway, mereka telah berjumpa dengan seorang kawan Thavaselvan bernama Najif (nama sebenar tidak

tahu). Najif adalah kawan Thavaselvan dan Perayu tidak mengenali Najif. Ini kali pertama Perayu berjumpa dengan Najif.

- [16] Di Sunway, Perayu telah diminta oleh Thavaselvan untuk meletakkan motorsikal Perayu di hadapan sebuah pasar mini. Selepas Perayu meletakkan motorsikalnya di situ, Perayu telah mengikut Thavaselvan dan Najif menaiki kereta Iswara (nombor pendaftaran tidak ingat) kepunyaan Najif menuju ke sebuah flat (alamat tidak tahu), mungkin di Sri Muda. Kereta Iswara tersebut dipandu oleh Najif.
- [17] Perayu tidak pernah pergi ke flat tersebut sebelum kejadian. Ini adalah kali pertama Perayu pergi ke situ. Setelah tiba di flat tersebut, Thavaselvan telah mengajak Perayu dan Najif naik ke tingkat tiga (3) flat tersebut dan apabila mereka tiba di tingkat 3 flat tersebut, Thavaselvan dan Najif telah masuk ke dalam rumah si mati. Perayu tidak masuk ke dalam rumah si mati kerana bercakap dalam telefon dengan kakak Perayu di luar rumah si mati kerana kakak Perayu telah menelefon Perayu pada masa itu. Semasa Perayu sedang bercakap telefon di luar rumah si mati, Perayu terdengar bunyi dari dalam rumah dan Perayu terus masuk ke dalam rumah si mati.
- [18] Setelah Perayu masuk ke dalam rumah si mati, Perayu nampak Thavaselvan dan si mati sedang bergaduh dan terdengar Najif memberitahu Panas (SP1) kalau ada pisau tolong angkat. Semasa Perayu masuk ke dalam rumah si mati, SP1 memang ada di dalam rumah si mati. Atas arahan Najif, Perayu nampak SP1 mengambil parang dari tepi televisyen dan memberikan kepada Najif. Selepas itu, Perayu nampak Najif memberikan parang tersebut kepada Thavaselvan yang sedang bergaduh dengan si mati. Kemudian Perayu nampak Thavaselvan menetak si mati menggunakan parang tersebut.
- [19] Perayu telah cuba menghalang Thavaselvan daripada menetak si mati dengan menarik badan Thavaselvan dan merampas parang tersebut daripada tangan Thavaselvan. Selepas merampas parang tersebut

daripada tangan Thavaselvean, Perayu telah menyerahkan parang tersebut kepada Najif. Selepas Perayu menyerahkan parang tersebut kepada Najif, Perayu tidak tahu apa berlaku kepada parang tersebut dan Perayu juga tidak melihat parang tersebut semasa berada di dalam kereta lswara Najif.

- [20] Semasa si mati ditetak oleh Thavaselvean, Perayu nampak SP1 berdiri di sebelah pintu rumah si mati dan hanya memerhatikan perbuatan Thavaselvean sahaja. Selepas si mati ditetak, Perayu bersama Thavaselvean, Najif dan SP1 telah keluar dari rumah si mati dan turun ke bawah flat dan masuk ke dalam kereta lswara yang dipandu Najif menuju ke sebuah kuil berhampiran (alamat tidak tahu). Sampai di kuil tersebut, kesemua mereka telah keluar dari kereta Najif dan selepas itu mereka telah membasuh tangan, kaki dan baju yang dipakai mereka dan kemudiannya bersembahyang di kuil tersebut.
- [21] Selepas ditahan polis, Perayu dibawa ke hospital untuk diambil spesimen darah dan air liur Perayu dan tiada ujian cap cari, spesimen rambut dan spesimen pakaian Perayu diambil oleh pihak polis. Selepas kejadian, Perayu tidak ada berjumpa dengan Thavaselvean atau SP1. Perayu tidak membuat report polis kerana hanya mengikut Thavaselvean dan Najif ke rumah si mati. Perayu menafikan telah menetak atau membunuh si mati. Perayu menyatakan Thavaselvean yang bergaduh dan menetak si mati dengan parang tersebut semasa kejadian.

Alasan-Alasan Rayuan

- [22] Perayu telah mengutarakan lapan (8) alasan rayuan utama iaitu:
- (a) SP1 adalah seorang saksi yang tidak kredibel, rakan sejenayah dan seorang saksi yang berkepentingan serta mempunyai keperibadian yang tidak baik (bad character evidence).
 - (b) Wujud kecacatan pada sesi kawad cam.

- (c) Pendakwaan hanya bergantung kepada keterangan ikut keadaan (*circumstantial evidence*).
- (d) Terdapat “*break in chain of causation*” apabila si mati telah dialihkan sebelum ketibaan pihak forensik.
- (e) Kegagalan pihak pendakwaan melakukan analisa DNA di tempat kejadian bagi membandingkannya dengan DNA Perayu.
- (f) Kegagalan pihak pendakwaan memanggil Prabhu/Pirabu dan majikan Prabhu/Pirabu untuk memberi keterangan telah memprejudiskan Perayu.
- (g) Terdapat keraguan munasabah yang berjaya dibangkitkan oleh pihak pembelaan.

Keputusan Kami

Alasan (a): Kredibiliti SP1

[23] Peguambela yang bijaksana menghujahkan bahawa hakim bicara yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila memutuskan bahawa SP1 adalah saksi yang kredibel hanya kerana tidak ada pergaduhan di antara SP1 dan si mati pada ketika itu, SP1 merupakan kawan baik si mati dan keterangan SP1 adalah konsisten tanpa membuat pengamatan kehakiman ataupun *judicial appreciation* mengenai keperibadian (*character evidence*) SP1 serta keterangan-keterangan lain yang telah dikemukakan oleh pihak pembelaan seperti:

- (i) SP1 mempunyai rekod jenayah lampau yang ekstensif serta keperibadian yang tidak baik;
- (ii) SP1 merupakan seorang yang secara amnya agresif di mana SP1 sendiri telah mengakui fakta ini;

- (iii) SP1 merupakan seorang saksi berkepentingan dalam kes ini kerana pada awalnya SP1 telah dituduh bawah seksyen 302 Kanun Keseksaan dan direman selama tempoh 10 bulan bagi kesalahan yang sama;
- (iv) SP1 telah dilihat oleh sami kuil (SP12) di Kuil Hindu berkelakuan seperti tidak ada apa-apa yang berlaku dan menjerit dengan garang kepada Perayu selepas sahaja kejadian berlaku di rumah si mati;
- (v) SP1 telah melarikan diri ke Johor Bahru selepas kejadian pada 8/5/2015;
- (vi) SP1 tidak membuat sebarang laporan polis berkenaan kejadian tersebut walaupun beliau kononnya merupakan kawan baik si mati; dan
- (vii) SP1 yang kononnya merupakan kawan baik si mati tidak memaklumkan kejadian kepada kakak si mati (SP7).

[25] Menyentuh mengenai isu kredibiliti SP1 ini, hakim bicara yang bijaksana telah membuat analisa dan dapatan seperti berikut:

[16] Dalam dapatan mahkamah ini, SP1 adalah saksi utama pihak pendakwaan. SP1 adalah saksi mata yang berada di tempat kejadian dan melihat mangsa dihiris atau dipotong semasa kejadian oleh tertuduh dan Selvam. Mahkamah ini telah membuat penilaian yang maksima ke atas keterangan dan kredibiliti SP1 dan berpuas hati SP1 adalah saksi yang kredibel dan boleh dipercayai. Selanjutnya keterangan SP1 diterima oleh mahkamah ini.

[17] Semasa kejadian, SP1 nampak perbuatan tertuduh dan Selvam menggunakan pisau untuk menghiris atau memotong mangsa dan menyebabkan mangsa mengalami kecederaan-kecederaan 25 Luka hiris dan tetak ke atas tubuh mangsa. Ini

disokong oleh laporan bedah siasat [lihat P26] dan juga menurut keterangan SP5. Perbuatan tertuduh dan Selvam secara niat bersama menghiris atau memotong mangsa telah menyebabkan mangsa kehilangan darah yang banyak. Kecederaan- kecederaan parah yang dialami mangsa telah menyebabkan kematian mangsa semasa kejadian.

[18] Berdasarkan keterangan saksi-saksi pendakwaan, SP1 tidak terlibat dalam menyebabkan kematian mangsa. Tiada pergaduhan atau pertengkaran di antara mangsa dan SP1. Malahan mangsa dan SP1 adalah kawan baik. SP1 tidak terlibat menghiris atau memotong mangsa semasa kejadian. Pihak yang terlibat dalam pembunuhan mangsa ialah tertuduh dan Selvam sahaja.

[19] Mahkamah ini dapati SP1 adalah saksi yang material yang berada di tempat kejadian. SP1 juga bukan rakan sejenayah (accomplice). Sebagai kawan baik mangsa, SP1 menumpang rumah mangsa semasa kejadian. Keterangan SP1 adalah kredibel dan konsisten bagi menyokong kes pendakwaan. Keterangan SP1 juga kukuh, boleh dipercayai dan diterima oleh mahkamah ini.

[20] SP1 telah diperiksa balas oleh peguambela tertuduh dengan panjang-lebar dan didesak secara agresif. Peguambela tertuduh juga telah mencadangkan pembelaan tertuduh kepada SP1 tetapi telah dinafikan oleh SP1. Cadangan peguambela bahawa terdapat pihak lain yang bergaduh dan menghiris atau memotong mangsa tidak dipersetujui dan dinafikan oleh SP1. Dalam dapatan mahkamah ini, keterangan SP1 adalah kukuh dan disokong (corroborated) secara material oleh keterangan saksi-saksi lain pendakwaan. SP1 telah memberikan keterangan dengan baik dan konsisten yang menunjukkan bagaimana tertuduh dan Selvam telah bergaduh, menghiris atau memotong mangsa dengan menggunakan pisau tersebut.

Akibat perbuatan tertuduh dan Selvam secara bersama, mangsa telah mengalami kecederaan- kecederaan yang parah dan ini telah menyebabkan kematian mangsa.

[21] Dalam dapatan mahkamah ini, SP1 adalah saksi yang jujur dan telah memberi keterangan dengan baik. Kebolehpercayaan SP1 gagal dicabar oleh peguambela tertuduh semasa pemeriksaan balas SP1. Keterangan SP1 juga disokong secara material oleh keterangan saksi-saksi lain pendakwaan. Kredibiliti dan keterangan SP1 juga selamat untuk diterima oleh mahkamah ini. Rekod kesalahan lampau SP1 yang dibangkitkan oleh peguambela tertuduh tidak menjejaskan kredibiliti dan kebolehpercayaan SP1 dalam dapatan mahkamah ini. Tujuan peguambela tertuduh adalah untuk menunjukkan SP1 mempunyai keperibadian (character) yang buruk dan tidak boleh dipercayai. Tetapi mahkamah ini dapati SP1 adalah saksi yang kredibel dan boleh dipercayai.

[77] Mahkamah ini dapati keterangan SP1 juga disokong secara material oleh keterangan saksi-saksi lain pendakwaan. Keterangan SP1 disokong secara material oleh keterangan SP3 bahawa hasil analisis kesan cap jari di rumah mangsa menunjukkan kewujudan kesan cap jari tertuduh (yang ditandakan sebagai F4 dan F5) dan ini menunjukkan tertuduh hadir dan berada di rumah mangsa semasa mangsa diserang, dihiris atau dipotong oleh tertuduh dan Selvam. Malahan SP1 dalam keterangannya melihat semasa keluar dari rumah mangsa tertuduh memegang pisau dan parang.

[78] Tertuduh juga semasa memberi keterangan membela diri telah mengaku berada di rumah mangsa semasa kejadian dan telah masuk ke dalam rumah mangsa dan melihat Selvam bergaduh dan menetak mangsa dengan parang. Selanjutnya tertuduh mengaku telah cuba menghalang Selvam dengan menarik badan Selvam dan berjaya merampas parang tersebut

daripada Selvam semasa kejadian. Malahan SP1 dalam keterangannya juga menyatakan melihat tertuduh memegang pisau dan parang semasa keluar dari rumah mangsa selepas kejadian.

[79] Selain itu, mahkamah ini dapati keterangan SP5 menyokong secara material keterangan SP1 bahawa kematian mangsa disebabkan Luka hiris di leher mangsa. Menurut SP1, mangsa telah diserang, dihiris atau dipotong oleh tertuduh dan Selvam dengan pisau semasa kejadian. Ini menyebabkan mangsa mengalami banyak Luka hiris dan juga tetak pada tubuh mangsa dan kehilangan banyak darah. Laporan bedah siasat [P26] oleh SP5 mengesahkan terdapat 25 Luka hiris dan tetak pada tubuh mangsa yang disebabkan oleh senjata tajam seperti pisau atau parang. Malahan SP5 dalam keterangannya telah menyatakan Luka hiris dan tetak pada tubuh mangsa boleh disebabkan oleh senjata tajam seperti pisau atau parang. SP1 juga telah melihat tertuduh memegang pisau dan parang semasa keluar dari rumah mangsa.

[80] Keterangan SP1 juga telah disokong secara material oleh keterangan SP6 (jiran mangsa) yang melihat tiga orang lelaki India keluar dari rumah mangsa semasa kejadian. SP6 dapat mengesahkan tertuduh sebagai salah seorang lelaki India tersebut yang memegang parang di tangannya semasa keluar dari rumah mangsa. SP6 juga melihat dan mengesahkan tertuduh memakai baju warna biru corak petak dan ini menyokong keterangan SP1 mengenai baju warna biru corak petak yang dipakai oleh tertuduh semasa kejadian.

[81] Keterangan SP12 (sami kuil) juga menyokong secara material keterangan SP1 bahawa pada malam kejadian selepas tertuduh, Selvam dan SP1 beredar meninggalkan rumah mangsa dan turun ke bawah flat, mereka bertiga telah menaiki sebuah kereta Iswara dan singgah di sebuah kuil berhampiran

untuk mendapatkan paip air bagi membasuh tangan, kaki dan pakaian yang dipakai mereka. SP12 telah berjumpa dengan mereka dan dapat mengecam tertuduh sebagai lelaki India yang bertanya di mana paip air dan juga lelaki India yang memaki-hamun Tuhan Hindu semasa itu. Selain itu, SP12 juga mengecam SP1 yang turut berada di kuil tersebut bersama tertuduh dan Selvam.

[82] Keterangan SP1 juga disokong secara material oleh keterangan SP15 bahawa SP1 tidak terlibat dalam menyerang, menghiris, memotong atau menetak mangsa menggunakan pisau atau parang semasa kejadian. Siasatan pihak polis menunjukkan hanya tertuduh dan Selvam sahaja yang terlibat dan akibat perbuatan mereka berdua telah menyebabkan mangsa mengalami 25 Luka hiris dan tetak pada tubuh mangsa yang membawa kepada kematian mangsa.

[83] Selanjutnya keterangan tertuduh semasa membela diri telah menyokong keterangan SP1 bahawa bukan SP1 yang bergaduh dan menyerang mangsa. SP1 hanya berdiam diri semasa kejadian dan memerhatikan perbuatan Selvam ke atas mangsa. Tertuduh juga menafikan terlibat dan menyatakan Selvam yang bergaduh dengan mangsa dan menetak mangsa dengan parang. Tertuduh cuba menghalang Selvam dengan menarik badan Selvam dan juga telah merampas parang yang dipegang oleh Selvam.”

[26] Berdasarkan kepada kupasan terperinci yang dibuat oleh hakim bicara yang bijaksana mengenai isu kredibiliti SP1 ini, kami tidak nampak di mana terjejasnya kredibiliti SP1 berpaksikan kepada keterangan beliau yang konsisten dan keterangan sokongan yang menguatkan lagi keterangan beliau.

[27] Meskipun SP1 mempunyai rekod sabitan lampau dan dikatakan mempunyai keperibadian yang tidak baik (bad character evidence)

namun kami mendapati tiada alasan kukuh dan yang mendesak untuk kami menolak keutuhan keterangan SP1. Kredibiliti SP1 telah diuji melalui sesi pemeriksaan balas oleh peguambela perayu dan ternyata SP1 telah berjaya melepasi ujian tersebut dengan jayanya. Ini menambahkan lagi keyakinan kami bahawa SP1 adalah seorang saksi yang boleh dipercayai.

[28] Keterangan SP1 mengenai serangan oleh Perayu dan Selvam bukanlah suatu rekaan yang dibuat semata-mata untuk melepaskan dirinya dan mengaitkan Perayu yang tidak pernah dikenalnya sebelum ini dengan kecederaan parah dan kematian ke atas si mati. Justeru itu, kami dapati tiada terdapat apa-apa salah arah oleh hakim bicara yang bijaksana dalam menilai keterangan SP1 yang telah dikemukakan semasa perbicaraan.

[29] Di dalam kes ***Mohamad Shakir Zufayri bin Ariffin v. Public Prosecutor*** [2017] MLJU 1207, Mahkamah memutuskan seperti berikut:

“[45] With respect to the credibility of the SP1, the complainant, it is trite that this court should be slow in interfering with such finding of the credibility of the complainant as the trial judge was a better person to assess such finding (see Andy Baginda v. PP [2003] 3 MLJ 644). From the totality of the evidence given by SP1 this court agreed with the finding of fact made by the trial judge that she was a credible witness and needed no corroboration. This was fortified by the fact that her evidence was consistent throughout the trial where she had narrated in detail what actually transpired as could be seen from the assessment of the evidence made earlier on by this court which found that there was a non-consensual and non-voluntary sexual intercourse.

[46] She was not shaken during cross-examination and in cross-examination reaffirmed the incident. Her evidence was

very probable (see PP v. Mohd Bandar Shah Bin Nordin (2008) 4 MLJ 556) and was “unusually convincing” (PP v. Mardai (1950) 1 MLJ 33 and PP v. Mohamad Liton Syed Malik (2008). The lack of cross-examination by the defence further affirmed that the involuntary sexual intercourse did take place which reaffirmed the factual matrix of the case (Brabakaran v. PP (1966) 1 MLJ 64). Furthermore, there was no motive or any reasons for her to lie in court to make the Accused/Appellant culpable.”

- [30] Di dalam kes *Amri Ibrahim & Anor v. PP* [2017] 1 CLJ 617, Mahkamah Persekutuan telah menyatakan yang berikut:

“[51] It is trite law that the view of the trial judge as to the credibility of a witness must be given proper weight and consideration. An appellate court should be slow in disturbing such finding of fact arrived at by the trial judge, who had the advantage of seeing and hearing the witness, unless there were substantial and compelling reasons for disagreeing.”

- [31] Di dalam kes ***PP v. Mohd Radzi bin Abu Bakar*** [2005] 2 MLRA 590, Mahkamah Persekutuan menegaskan seperti berikut:

“Now, it settled law that it is no part of the function of an appellate Court in a criminal case - or indeed any case to make its own findings of fact. That is a function exclusively reserved by the law to the trial Court. The reason is obvious. An appellate Court is necessarily fettered because it lacks the audio-visual advantage enjoyed by the trial Court.”

- [32] Di dalam kes *Lai Kim Hon & Ors v. PP* [1980] CLJU 197; [1980] 1 LNS 197, Mahkamah Persekutuan memutuskan seperti berikut:

“The principle of law governing appeals in criminal cases on questions of fact is well established, in that the Appeal Court will not interfere unless the balance of evidence is grossly

against the conviction especially upon a finding of a specific fact involving the evaluation of the evidence of a witness founded on the credibility of such witness.”

[33] Di dalam kes **Ong Hooi Beng & Ors v. PP** [2015] 3 MLJ 812, Mahkamah Rayuan memutuskan seperti berikut:

[29] In other words the learned trial judge disbelieved the appellants claim that they did not know they were processing drugs. Undoubtedly this is a finding of fact that is dependent on the trial judge's assessment of the appellants credibility as witnesses, which is primarily a matter for the trial judge: Watt or Thomas v. Thomas [1947] AC 484 487; Antonio Dias Caldeira v. Frederick Augustus Gray [1936] 1 MLJ 110 111.

[30] Having had the audio-visual advantage of seeing and hearing the appellants while they gave evidence, the learned trial judge was in the best position to assess their credibility and reliability, and certainly not us at the appellate stage who only have the benefit going through their evidence in cold print. It is true that the present-day technology allows us to capture court proceedings so that we can always play back the audio-visual recordings to see for ourselves how the witnesses behaved or reacted to certain questions, but there is no substitute for seeing and hearing them first hand and in real time.

[31] To entitle us to overturn the trial courts finding under such circumstances and substitute it with our own finding that the appellants were actually credible witnesses and that the belief that they entertained was in fact reasonably true, the burden is on the appellants to show that the finding is perverse and that the learned trial judge had failed to take proper advantage of his having seen and heard them giving evidence. We are not satisfied that the appellants have discharged that

burden. In Powell and Wife v. Streatham Manor Nursing Home [1935] AC 243; 104 LJKB 304; 152 LT 563; 79 Sol Jo 179; 51 TLR 289 Lord Wright in dealing with a similar issue said:

Two principles are beyond controversy. First it is clear, that, in an appeal of this character, that is from the decision of a Trial Judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal must, in order to reverse, not merely entertain doubts whether the decision below is right, but must be convinced that it is wrong.

Alasan (b): Wujud kecacatan pada sesi kawad cam.

[34] Berkaitan tentang isu ini, peguambela Perayu yang bijaksana menghujahkan bahawa hakim bicara yang bijaksana telah terkilaf dari segi undang-undang dan fakta apabila menerima keterangan kawad cam yang dipersoalkan kesahihannya atas faktor-faktor berikut:

- (i) *Peserta kawad cam berbeza dari segi saiz fizikal dan ketinggian serta berbeza bangsa di mana perbezaan ini telah memprejudiskan Perayu;*
- (ii) *Beberapa orang awam yang sama telah dibariskan bersama Perayu pada dua hari yang berbeza semasa menjalani sesi kawad cam; dan*
- (iii) *Gambar Perayu dan Selvam telah disiarkan dalam surat khabar Tamil untuk meminta mereka tampil ke hadapan bagi membantu siasatan. Ini menjadikan kawad cam yang dijalankan tidak sah kerana saksi-saksi telah melihat gambar kedua-dua suspek bagi kes ini.*

[35] Bagi menjawab persoalan ini, hakim bicara yang bijaksana di dalam alasan penghakimannya menyatakan seperti berikut:

- [102] Dalam dapatan mahkamah ini, proses kawad cam yang dijalankan oleh SP13 adalah teratur dan mengikut peraturan yang ditetapkan oleh pihak PDRM. Semasa kawad cam yang diadakan oleh SP13 pada 21 Julai 2017 di Bilik Kawad Cam, Lokap Polis Berpusat Shah Alam, Selangor, SP1 telah dapat mengecam tertuduh sebagai lelaki India yang telah menghiris atau memotong mangsa menggunakan pisau semasa kejadian. Laporan kawad cam telah disediakan oleh SP13 dan ditandatangani oleh SP13 [lihat laporan kawad cam di P53].
- [103] Berdasarkan P53, mahkamah ini dapati peserta-peserta kawad cam semuanya berbangsa India dan tertuduh berada di kedudukan no. 2. Dalam dapatan mahkamah ini, keterangan SP13 dan P53 telah menafikan keterangan tertuduh bahawa peserta-peserta kawad cam berbangsa India, Melayu dan Bangladesh. Dalam dapatan mahkamah ini proses kawad cam telah dijalankan oleh SP13 dengan baik dan teratur dan tertuduh tidak diprejudiskan.
- [104] Selanjutnya semasa kawad cam yang diadakan oleh SP13 pada 26 Julai 2017 di tempat yang sama, semua peraturan yang ditetapkan telah dipatuhi dan kawad cam telah dijalankan dengan baik dan teratur. Semasa kawad cam, SP6 telah dapat mengecam tertuduh sebagai lelaki India yang dilihat oleh SP6 memegang parang semasa keluar dari rumah mangsa selepas kejadian. Laporan kawad cam telah disediakan oleh SP13 yang telah menandatangani laporan kawad cam tersebut [lihat laporan kawad cam di P54].
- [105] Berdasarkan P54, mahkamah ini dapati peserta-peserta kawad cam semuanya berbangsa India dan semasa kawad cam, tertuduh berada di kedudukan no. 6. Keterangan SP13 dan P53 telah menafikan keterangan tertuduh bahawa peserta-peserta kawad cam berbangsa India, Melayu dan Bangladesh. Dalam dapatan mahkamah ini, proses kawad cam telah dijalankan

oleh SP13 dengan baik dan teratur dan tertuduh tidak diprejudiskan. Malahan selain kawad cam, tertuduh juga telah dicam oleh SP1, SP6 dan SP12 semasa perbicaraan di mahkamah. Lihat R v. Turnbull & Ors [1977] QB 224; [1976] 3 All ER 549 (MR); Arumugam s/o Muthusamy v PP [1998] 3 MLJ 73 (MP); Duis Akim & Ors v. PP [2013] 9 CLJ 692 (MP); Basuni Toher v. PP [2012] CLJU 603; [2012] 1 LNS 603 (MR); Ong Poh Cheng v. PP [1998] 4 MLJ 8 (MR); [1998] 4 AMR 3225; Dorai Pandian a/I Munian & Anor v. PP [2009] 4 MLJ 525 (MR); [2009] MLJU 179 (MR)]. [106] Oleh itu mahkamah ini tidak bersetuju dengan hujahan peguambela tertuduh bagi isu tersebut.

[36] Sebelum kami menentukan samada kawad cam yang dijalankan ini adalah teratur dan sah serta tiada wujud apa-apa kepincangan yang berlaku, adalah penting bagi kami meneliti dahulu keterangan SP1 secara keseluruhannya.

[37] SP1 di dalam **pemeriksaan utama (Nota Prosiding Kandungan 10 RR Jilid 2(1) di m/s 89-92)**, menyatakan seperti berikut:

S: Apa itu kawad cam?

J: Kawad cam itu ialah orang kita kenali ke atau tidak kenali.

S: Untuk kes ASP Daniel ini kamu ada buat kawad cam?

J: Saya ada buat. Maaf, orang ada kawad cam saya dan saya ada kawad cam orang.

S: Mana satu yang dulu? Kamu kawad cam orang dulu ke?

J: Orang kawad cam saya dulu.

S: Hari yang sama ke?

J: Tidak

414: S: *Kamu kawad cam siapa?*

J: *Saya kawad cam lelaki India yang ikut Selvam ke rumah Tammiya.*

S: *Dalam kawad cam yang kamu pergi itu kamu ada cam lelaki India itu?*

J: *Ya, saya ada cam.*

S: *Sebelum kawad cam pernah kamu tengok gambar dia?*

J: *Ya, ada gambar.*

S: *Siapa tunjuk gambar lelaki India Krishnan?*

J: *ASP Daniel tunjuk lebih kurang 6 gambar itu ada tidak lelaki India yang ikut Selvam ke rumah Tammiya. Saya ada tunjuk gambar lelaki India itu kepada ASP Daniel.*

S: *Rujuk gambar. Kamu cam gambar tersebut?*

J: *Ya.*

419: S: *Adakah itu gambar sepertimana yang ditunjukkan ASP Daniel kepada kamu?*

J: *Ya.*

420: *Adakah gambar lelaki macam ini?*

J: *Ya.*

TPR: Pohon ditandakan sebagai ekshibit

Mahkamah: ID13A & B - gambar lelaki India.

S: *Encik Krishnan, gambar tadi adakah itu gambar orang yang kamu tunjuk kepada ASP sebagai lelaki India yang ikut Selvam?*

J: Ya, masa kejadian dia ini yang saya tengok.

S: Dalam 6 gambar itu ada siapa-siapa lagi yang kamu kenal seingat kamu?

J: Sebenarnya ASP Daniel tunjuk 1, ada pegawai-pegawai lain yang soal siasat juga tunjuk gambar lain.

S: Pegawai lain yang tunjuk gambar itu ada siapa-siapa yang kamu kenal dalam gambar-gambar lain?

J: Tidak ada.

S: Encik Krishnan, kamu kata kamu ada pergi cam orang lain dan kamu camkan laki dalam gambar ID13 ini. Kamu cam orang berapa kali?

J: 3 kali.

S: Dalam kawad cam kamu ada cam lelaki dalam ID13 ini?

J: Ada.

S: Selain itu kamu ada cam sesi apa lagi?

J: Tiada.

S: Masa kawad cam itu kamu camkan lelaki dalam ID13 ini sebagai orang yang buat apa?

J: Lelaki yang datang dengan Selvam di kejadian rumah Tammiya. Saya dapat pastikan dia yang ikut Selvam.

[38] Di dalam sesi **pemeriksaan balas**, SP1 di dalam keterangannya (**Nota Prosiding Kandungan 12 RR Jilid 2(3) di m/s 290-292**) menyatakan seperti berikut:

S: Sebelum cam mengikut keterangan kamu ASP Daniel telah menunjukkan gambar, adakah itu betul?

J: Tidak. Saya balik dari penjara, masa itu IPD Shah Alam lokap, ada kenduri perayaan, saya turun, masuk, cam, lepas itu cam sekali lagi, lepas itu saya dibawa soal siasat statement.

S: Berdasarkan keterangan kamu soalan yang ditanya adalah dalam kawad cam kamu cam lelaki India. Jawapan kamu ialah ya. Sebelum kawad cam kamu ada lihat gambar dia.

J: Tidak

S: Itu adalah jawapan kamu.

Mahkamah: Tidak setuju?

S: Selepas itu sebelum kawad cam saya ada lihat gambar lelaki India. Ya, ada. Gambar lelaki India itu ditunjukkan oleh siapa. Dia tunjukkan lebih kurang 6 gambar. Dalam hari itu datang dengan Selvam. First 5 gambar. Sekarang sila jelaskan cakap dengan betul ASP Danial ada tunjukkan berapa keping gambar sebelum kawad cam?

J: Masa kawad cam tidak ada gambar ditunjukkan. Yang masa saya sudah kena tangkap di JB datang ke Shah Alam sebelum masa soal siasat dia tanya saya cakap seorang lelaki India itu tidak dikenali. Polis masa soal siasat ada gambar-gambar masa itu ada seorang polis tunjuk gambar daripada handphone. Ini orang ke dan saya ada tunjuk dan kata ya.

S: Kamu setujulah apabila saya katakan bahawa kamu pernah ditunjukkan gambar individu tersebut sebelum proses kawad cam, betul atau tidak?

J: Tidak.

S: Sila lihat gambar ID13(a) dan ID13(b). Cuba beritahu mahkamah IDD13(a) dan (b) dan mengikut keterangan kamu

gambar ini telah ditunjukkan oleh ASP Danial kepada kamu, betul?

J: Masa kena tangkap.

S: Masa kena tangkap ASP Danial tunjuk gambar ini kepada kamu, betul?

J: Ya. Dia tanya ini siapa. Saya cakap ini orang ikut Selvam datang masa kejadian berlaku.

TPR: Dia tanya apa?

SP1: Dia tunjuk gambar-gambar. Saya kenal masa itu Selvam. Dia cakap yang ikut Selvam itu siapa. Semasa soal siasat dia kata orang itu saya mesti kenal. Saya cakap orang itu memang tidak kenal. Selepas itu gambar itu datang. "Ini orang ke". Dia memang ada dalam watak saya cakap ya. Ini orang ada mari ikut Selvam potong orang'. Saya ada cakap.

S: Saya katakan kamu tidak bercakap benar kerana gambar ini sebenarnya telah ditunjukkan oleh ASP Danial kepada kamu. Gambar ini saja yang telah ditunjukkan oleh ASP Danial. Betul atau tidak?

J: Ini gambar betul saya dapat tengok masa saya kena tangkap.

TPR: What's the question? YA, if I may clarify. What is the last question.

Mahkamah: Mr. Swinder? Gambar ditunjukkan oleh ASP Danial?

P/bela: Yes

[39] Semasa pemeriksaan semula (Nota Prosiding Kandungan 13 Jilid 2 (4) di m/s 378-379), SP1 menyatakan seperti berikut:

- S: *Kenapa semalam peguam tanya sebelum kawad cam ada siapa Tuan Danial atau polis tunjuk gambar kepada kamu ke, kamu cakap tidak ada. Tapi dulu kamu cakap ada. Masa siasatan Tuan Danial ada tunjuk kamu gambar dan kamu ada camkan Vasuthevan dalam gambar.*
- J: *Saya jelaskan masa saya kena tangkap apa yang bagitau mahkamah dari A sampai Z masa soal siasatan saya bagitau. Masa itu terus saya bagi tahu Selvam datang, Selvam macam mana, siapa itu.*
- S: *Itu tidak apa. Simple saja soalan saya. Kamu cakap sebelum kawad cam polis tidak ada tunjuk gambar Vasuthevan. Kenapa kamu cakap macam ini?*
- J: *Memang tidak ada tunjuk. Saya nampak gambar dia masa saya kena tangkap dia orang tanya yang orang ikut Selvam itu siapa. Saya cakap tidak tahu. Orang itu saya tak kenal. Tidak pernah nampak.*
- S: *Masa kawad cam tidak tunjuk gambar. Masa soal siasat ada tunjuk gambar?*
- J: *Ya. Saya memang tidak tahu orang ini. Orang itu saya tidak kenal. Tiba-tiba taruk gambar yang ikut Selvam punya. Ini Selvam, ini satu gambar. Saya cakap ya ini orang masa itu ada. Dia punya gambar dan dia punya muka saya memang cam dalam otak sebab dia suruh “jalankan saya sekali”. Saya sudah takut kena ugut dengan saya sudah confident dia punya muka dengan clear dalam otak saya.*
- S: *ASP Danial masa soal siasat dia tunjuk satu gambar atau dia tunjuk berapa keping gambar pada kamu?*
- J: *5 ke 6 gambar dia tunjuk. Contoh 5 gambar dia tunjuk. Saya cam satu gambar dalam itu saya tunjuk ini orang ada ikut*

mari. Mula- mula dia tanya yang ikut Selvam itu budak itu siapa. Itu you punya kawan, mana rumah. Saya cakap saya memang tak tahu mana dia stay, dia punya rumah, siapa dia. Tiba-tiba dia angkat mari gambar dan tunjuk dalam itu ada kes. Saya cakap ya betul tuan ini orang.

[40] Selanjutnya, SP15 (ASP Mohammad Daniel Lee bin Abdullah) yang merupakan pegawai penyiasat bagi kes ini menyatakan bahawa gambar Perayu dan Selvam telah disiarkan dalam surat khabar tempatan.

[41] SP15 dalam memberi keterangannya semasa **pemeriksaan balas (Nota Prosiding Kandungan 18 Jilid 2 (9) m/s 928-929)** menyatakan seperti berikut:

“47.S: Sekiranya dalam siding akhbar gambar kedua-dua OKT telah pun dipaparkan, secara logiknya kesemua pengecaman muka yang dilakukan di dalam kawad cam tersebut adalah sudah menjadi “tainted” because there is already a perception that this is the individual. Don't you think so? Secara logik berikan jawapan kepada mahkamah.

J: Secara logik mungkin yes.

48.S: Kamu setuju?

J: Mungkin Betul.

S: Berdasarkan jawapan ASP sendiri, adakah ASP bersetuju apabila saya katakan bahawa pengecaman positif yang dibuat ke atas OKT Vasuthevan oleh saksi pendakwaan seperti Panas dan Muniamah adalah disebabkan oleh sidang akhbar yang dijalankan. Jadi, pengecaman adalah menjadi tidak sah kerana satu sidang akhbar telah pun menunjukkan gambar- gambar OKT.

J: Itu kemungkinan.”

[42] Lanjutan daripada itu, SP15 semasa **pemeriksaan balas (Nota Prosiding Kandungan 18 Jilid 2(9) m/s 953-955)**, menyatakan seperti berikut:

“27.S: Adakah ASP bersetuju apabila saya katakan bahawa sebelum tangkapan dibuat ke atas kelima-lima orang ini, ASP telahpun mengeluarkan warn “wanted list”. ASP juga telah mengeluarkan gambar Selvam dan juga Vasuthevan bersabit kes 302 ini walaupun mereka suspek dan telah dipaparkan di media-media massa pada ketika itu sebelum tangkapan dibuat. Betul atau tidak?

J: Memang saya keluarkan “wanted list” bagi kedua-dua tersebut dan didaftarkan.

28. S: Gambar-gambar telah ditampal di dalam media-media massa pada ketika itu. Betul atau tidak?

J: Media massa, stockman PDRM ada mengeluarkan kenyataan tersebut, mohon bantu mencari ataupun kedua-dua tampil ke hadapan untuk membantu menjalankan kes-kes bunuh ini.

S: Bila pengecaman dibuat oleh Muniamah ke atas Vasuthevan dan suspek-suspek lain, gambar manakah yang dapat dipaparkan di dalam minda Muniamah? Boleh jelaskan?

J: Itu atas peribadi saksi-saksi tersebut.

S: Saya katakan bahawa oleh kerana ASP telah mengeluarkan gambar Vasuthevan dan Selvam dan telah dikeluarkan di dalam surat khabar dan media massa tempatan termasuk surat khabar Tamil, Cina dan bahasa Melayu, di dalam TV dan sebagainya, maka sudah pasti Muniamah iaitu jiran kepada si mati sudah mempunyai gambaran di dalam minda beliau. Maka apabila satu kawad cam dilaksanakan, sudah pasti kawad cam itu tidak

betul kerana individu tersebut telah pun dipaparkan di dalam surat khabar.

J: Saya agak tidak bersetuju sangat apa yang peguambela tanya. Itu atas peringatan Muniamah sendiri pada hari kejadian. Mungkin telah masuk ke dalam ingatan beliau dan tidak dapat dilupakan walaupun gambar-gambar “wanted person” telah disiarkan dalam media massa. Kawad cam itu adalah sebahagian untuk membantu siasatan kes bunuh saya.

S: Adakah gambar keempat-empat suspek selain daripada OKT ada dipaparkan di mana-mana media massa bagi apa-apa kes lain pada bila-bila masa?

J: Tiada.”

[43] Wajar dinyatakan bahawa SP1 telah di tangkap pada 9/6/2015 (ekshibit P71), Perayu pula telah ditangkap pada 15/7/2017 (ekshibit P76) dan kawad cam terhadap Perayu oleh SP1 telah dibuat pada 21/7/2017 (ekshibit P53).

[44] Sebelum Perayu ditangkap pada 15/7/2017, SP15 mengakui bahawa gambar Perayu telah dikeluarkan dan disiarkan di dalam surat khabar dan media massa tempatan termasuk surat khabar Tamil, Cina dan Bahasa Melayu, di dalam TV dan lain-lain lagi sebagai “wanted list”.

[45] Selepas Perayu ditangkap dan sebelum pengecaman dibuat oleh SP1 terhadap Perayu di dalam sesi kawad cam yang diadakan oleh ASP Vignesh Kumar a/l Subramaniam (SP13), SP1 telah pun mengakui di dalam pemeriksaan utamanya bahawa sebelum sesi kawad cam dibuat, SP1 ada ditunjukkan oleh SP15 gambar Perayu sahaja dan SP1 memberitahu SP15 bahawa Perayu ada bersama-sama Selvam semasa pembunuhan ini berlaku.

[46] Berpegang kepada keterangan ini sahaja, kami dapati sudah mencukupi untuk kami memutuskan bahawa pengecaman positif yang

dibuat oleh SP1 terhadap Perayu semasa kawad cam tersebut adalah cacat, tidak sah serta memprejudiskan Perayu. Pengecaman ini sewajarnya ditolak dan tidak diterima masuk kerana kami percaya bahawa gambar Perayu yang ditunjukkan oleh SP15 kepada SP1 telah membantu SP1 untuk mengecam Perayu dengan mudah. Dengan penolakan ini, maka tiada keperluan lagi bagi kami untuk mengulas dengan lebih lanjut mengenai peserta-peserta kawad cam yang didakwa oleh peguambela Perayu berbeza dari segi saiz fizikal, ketinggian dan bangsa.

[47] Di dalam kes ***Public Prosecutor v. Kok Heng* [1948] 14 MLJ 171**, Laville J (beliau pada ketika itu) menyatakan seperti berikut:

“Identification by photographs: this in certain circumstances may be reliable, but it is, in my opinion dangerous, if followed by an identification parade in that it must be inevitably tend to identification of the photograph rather than the person. In this case, identification of No. 3 accused cannot be accepted. Since there was doubt at the only real parade, i.e. that of photo, the second parade of individuals in regard to No. 3 is vitiated by the photographic parade, where there was failure to identify.

While identification by photograph before arrest is acceptable in law, it has always been held that once a man has been arrested the identification should be by personal inspection. If there is identification by photograph, the identification and the method by which it is held must be flawless. In this case both drawbacks to the identification exists.”

[48] ***Sarkar's Law of Evidence 15th Ed, 1999 Vol 1 (pp 209-231)*** menyatakan seperti berikut:

“Showing the identifying witnesses two good photographs of the accused before process of identification is improper and conviction cannot be sustained. It is one thing for a police

officer in doubt upon the question of arrest to show a photograph to persons in order to obtain clue. But it is most improper to inform a witness beforehand who has to be called as an identifying witness, by the process of making the features of the accused person familiar to him. If the intention is to rely on the identification of the suspect by a witness his ability to identify should be tested without showing him the suspect or his photograph, or furnishing him the data for identification.”

[49] Di dalam kes ***Habee Bur Rahman v. Public Prosecutor [1971] 2 MLJ 194***, B.T.H. Lee J (beliau pada ketika itu) menyatakan seperti berikut:

“The next matter for consideration is the question of identification by way of photographs. The learned author of Sarkar on Evidence (11th Edition), page 88 has this to say:

“If it is desired that a person, who may be a witness, should identify the photograph of an accused person, the proper course is to show that person a number of photographs of different people. There is no objection to the police who are seeking for information as to the person or persons who may have committed a crime showing the persons who are able to identify the criminal a photograph or series of photographs to see if they can pick out any one of them who resembles the person whom they think they will be able to identify.”

It was in evidence that the coffee-shop assistant (PW5) was shown only one photograph, and it was that photograph which helped him to identify the accused.

As regards the test identification the learned magistrate rejected that part of the evidence as being unreliable.

I therefore find no ground for interfering with his decision.”

[50] Meskipun pengecaman oleh SP1 terhadap Perayu melalui kawad cam ini ditolak oleh Mahkamah ini, namun ini tidak melemahkan atau meruntuhkan kes pendakwaan. Identiti Perayu tetap dapat dikenalpasti oleh SP1 (walaupun tanpa bantuan kawad cam) kerana SP1 dapat melihat wajah Perayu dengan jelas dari jarak yang dekat semasa dan selepas kejadian. Pengecaman kandang (*dock identification*) oleh SP1 turut menguatkan lagi keterangannya. Bukan setakat itu sahaja, malah pengecaman positif oleh SP6 dan SP12 terhadap Perayu juga turut membantu memperkukuhkan keterangan SP1 bahawa Perayu adalah pelaku dalam kejadian bunuh tersebut.

[51] Di dalam kes *Ong Poh Cheng v. PP* [1998] 4 CLJ 1, Mahkamah Rayuan memutuskan seperti berikut:

“It does not follow, as a matter of course, that just because the learned judge rejected the identification at the identification parade, he must of necessity also reject the dock identification of the appellant. His rejection of the evidence of the evidence of the identification at the identification parade was in no way fatal to the dock identification of the appellant as the person who had committed the offence. On the facts and circumstances of this case, the court or dock identification of the appellant was rightly accepted ...”

[52] Di dalam kes *Dorai Pandian a/l Munian & Anor v. Public Prosecutor* [2012] 10 CLJ 22, Mahkamah Rayuan menyatakan seperti berikut:

“In this regard, concluding on his submission that the identification parades in this case were badly and unfairly conducted, he contended that the identification parade evidence should be rejected. He submitted that if the identification parade evidence was rejected, the court should not convict the second accused based on the evidence of dock identification. We do not agree. As we will demonstrate shortly, such a proposition is not supported by established

authorities on the subject. The holding of an identification parade is a part of the investigation process carried out by the investigating authority.

The evidence of identification parade is relevant and admissible under s. 9 of the Evidence Act 1950, and can be used to corroborate the substantive evidence given by the witness in court on identification of the accused as the perpetrator of the alleged crime. It is well settled that the substantive evidence is the evidence of identification in court...”.

[53] Fakta tentang pengesanan ini di zahirkan oleh SP1 semasa pemeriksaan utama (**Nota Prosiding Kandungan 10 Jilid 2 (1) di m/s 92-94**) bila beliau menyatakan seperti berikut:

S: Di rumah Tammiya malam kejadian bila masa kamu nampak muka dia?

J: Yang saya nampak muka dia semasa kejadian hari itu saya tengah kena cekik dengan kaki Selvam, masa itu saya terkejut bangun tidur masa itu saya nampak Selvam dan Tammiya pula kena pegang dengan tangan dan pisau sekali. Di belakang Tammiya saya nampak muka lelaki itu.

S: Berapa kali dalam rumah Tammiya kamu nampak muka ini (ID13)?

J: Saya tidak boleh kata berapa kali tapi dalam rumah itu yang jelas masa bangun tidur kena cekik dengan Selvam. Lepas itu, saya kena rapat di dinding saya nampak tiga ke empat kali. Masa Selvam cakap saya dapat jeling saja dalam tiga kali. Masa berjalan Selvam suruh pakai seluar saya nampak dengan terang muka dia 2 kali. Masa keluar dari bilik saya lalu dekat Tammiya dan lelaki itu masa itu memang jelas sangat dalam memori saya.

S: Jadi kamu dapat lihat lebih kurang dalam 10 kali?

J: Ya.

439: S: Selepas kamu pakai seluar jeans pergi ke Tammiya dengan lelaki itu masa itu sudah jelas dalam otak, betul?

J: Ya, sudah jelas ingat. Masa dia cakap “kasi dia jalan” saya terus tengok dia sudah jelas juga. Sebelum itu saya tak pernah tengok dia.

S: Bagaimana semasa di luar pintu grill itu kamu ada nampak lelaki India itu lagi?

J: Masa itu nampak jelas juga sebab rapat antara baju saya dengan lelaki India itu.

S: Bagaimana dengan kawasan di kuil India itu kamu ada nampak muka lelaki India itu lagi.

J: Ya.

S: Boleh saya kata masa itu kamu sudah ingat dan cam muka dia (tunjuk ID13).

J: Sudah.

S: Di kawasan flat pula?

J: Saya nampak muka dia juga.

S: Di kawasan kuil tersebut macam mana keadaan lampu di sana yang kamu nampak muka lelaki India itu?

J: Ada lampu jalan di kawasan itu.

S: Di kawasan flat itu ada lampu ke?

J: Ya. Ada lampu tiang warna putih. Di kuil lampu jalan warna kuning.

- [54] Berdasarkan keterangan SP1 di atas, adalah jelas bahawa tanpa pengecaman melalui kawad cam sekali pun, SP1 mampu untuk mengecam Perayu tanpa apa-apa keraguan.
- [55] Dalam dapatan kami, keterangan SP1 mengenai identiti Perayu ini telah disokong secara material oleh keterangan SP6 (jiran si mati) dan SP12 (sami Kuil Hindu) dan juga oleh keterangan saksi-saksi lain pendakwaan seperti SP3 (Penolong Pendaftar Penjenayah), SP5 (Pakar Perunding Perubatan Forensik, Jabatan Perubatan Forensik, Hospital Tengku Ampuan Rahimah Klang), SP7 (kakak si mati), SP8 (pegawai turus jenayah forensik IPK Selangor), SP9 (jiran si mati iaitu penghuni rumah no.308) dan SP15 (pegawai penyiasat kes). SP6 melihat Perayu keluar daripada rumah mangsa semasa kejadian dengan memakai baju warna biru corak petak dan memegang parang.
- [56] Keterangan SP1 ini diperkemaskan lagi dengan kewujudan kesan cap jari (F4 dan F5) Perayu di tempat kejadian yang jelas membuktikan bahawa Perayu sememangnya berada di rumah si mati bersama Selvam semasa kejadian tersebut. Ini menambahkan keyakinan kami tentang kebenaran keterangan SP1 dan pengakuannya bahawa beliau tidak terlibat dalam menyebabkan kematian si mati. SP3 juga turut mengesahkan kad lifting bertanda F4 dan F5 setelah dibuat pemeriksaan dan perbandingan dalam Sistem BIOFIS dikesan atas nama Perayu (Vasuthevan a/l Palaniappan K/P No. 881222-01-5893) yang pernah ditangkap bersangkut Semenyih Rpt. 793/12 (P22).
- [57] Malah Perayu juga di dalam pembelaannya tidak menafikan berada di tempat kejadian pada masa kejadian. Beliau hanya menafikan menetak atau memotong si mati sahaja.
- [58] Malah hasil bedah siasat yang dijalankan oleh SP5 ke atas tubuh si mati mendapati 25 Luka hiris dan tetakan pada tubuh si mati adalah

disebabkan oleh benda atau senjata tajam seperti pisau atau parang (P8(1-38)). Menurut SP5, punca kematian si mati adalah disebabkan oleh Luka hiris di leher (*incised wound to the neck*). Adalah nyata bahawa keterangan SP5 ini amat konsisten dengan keterangan SP1 yang mengatakan bahawa si mati telah dihiris dan dipotong oleh Selvam dan Tertuduh semasa kejadian.

- [59] Kesahihan keterangan SP1 menjadikan beliau seorang saksi yang kredibel dan bukannya seorang saksi berkepentingan atau rakan sejenayah sepertimana yang diujahkan oleh peguambela Perayu.

Alasan (c): Pendakwaan hanya bergantung kepada keterangan ikut keadaan (*circumstantial evidence*).

- [60] Penghujahan yang dilontarkan ini tidak menyebelahi Perayu. Sudah terang lagi bersuluh bahawa keterangan yang dikemukakan oleh pihak pendakwaan adalah bersandarkan kepada keterangan langsung (dan bukannya keterangan ikut keadaan) dari SP1 yang berada di tempat kejadian dan menyaksikan sendiri apa yang telah dilakukan oleh Perayu dan Selvam ke atas si mati. SP1 melihat sendiri Perayu bergaduh dengan si mati dan Perayu telah menghiris atau memotong si mati dengan menggunakan pisau yang berada di tangannya.

Alasan (d): Terdapat “*break in chain of causation*” apabila si mati telah dialihkan sebelum ketibaan pihak forensik.

- [61] Peguambela Perayu menghujahkan bahawa sebelum pasukan forensik dan pasukan bantuan kecemasan awal tiba ke tempat kejadian, si mati sebenarnya telah dialih serta diheret oleh individu-individu yang terdiri daripada orang awam sebagai cubaan untuk menyelamatkan mangsa. Bilangan orang awam yang dianggarkan memasuki tempat kejadian adalah 30 hingga 40 orang. Perkara ini disahkan oleh Puan Mohana a/p Muniandy (SP7). Berikutan daripada memasukkan orang awam, si mati telah terdedah kepada pelbagai faktor yang

berkemungkinan telah secara langsung mempercepat kehilangan nyawa mangsa.

- [62] Seterusnya, diujahkan juga bahawa ASP Mohd Ali Hanafiah Bin Hashim (SP8) dalam keterangannya telah mengesahkan bahawa beliau sebagai Pegawai Turus Jabatan Siasatan Jenayah Forensik D10 gagal untuk membuat sebarang komen atau catatan tentang mangsa yang telah dialihkan oleh SP6 serta kesan heretan serta kesan darah yang terdapat di tempat kejadian. SP8 juga telah mengakui bahawa beliau telah terlepas pandang tentang perkara ini dan fakta ini adalah amat penting dalam menentukan samada wujudnya sebarang kerosakan pada keterangan yang seterusnya telah menyebabkan “*break in the chain of causation*”.
- [63] Dengan hormatnya kami tidak bersetuju dengan hujahan peguamabela yang bijaksana ini. Laporan bedah siasat (P26) dan juga keterangan SP5 jelas membuktikan bahawa si mati telah mengalami banyak kecederaan akibat dihiris, dikelar atau ditetak pada tubuh si mati disebabkan oleh senjata tajam seperti pisau atau parang. Luka hiris yang paling bahaya ialah Luka hiris di leher kiri yang menyebabkan pembuluh darah di bawahnya terputus dan menyebabkan si mati kehilangan darah yang banyak di mana si mati boleh mati dalam masa 10 minit hingga 45 minit selepas cedera di leher.
- [64] Di dalam konteks ini, kami bersependapat dengan dapatan hakim bicara bila beliau menyatakan bahawa semasa SP6 dan anak-anaknya mengangkat dan mengalihkan tubuh dimati ke tepi peti ais, si mati dipercayai telah pun meninggal dunia. Ini disahkan oleh SP9 bila beliau menyatakan seperti berikut:

“untuk memastikan mangsa masih hidup atau pun tidak, saya telah pegang pergelangan tangannya untuk check nadi. Memang tiada denyutan jantung. Ya, betul mangsa telah meninggal dunia. Saya tahu bahawa denyutan jantung (nadi)

telah tiada sebab saya pernah menghadiri beberapa course untuk first aider. Dalam kelas first aider kita didedahkan untuk bantuan awal, cara bantuan cpr, check nadi. Selepas check nadi ramai orang datang masuk ke dalam rumah dan tengok. Sewaktu orang ramai datang masuk rumah saya sudah selesai check nadi.” (Nota Prosiding Kandungan 15 RR Jilid 2 (6) m/s 659-661).

- [65] Maka dengan itu, kami berpandangan tiada apa-apa kegagalan yang material di pihak pegawai atau pasukan forensik yang diketuai oleh SP8 dalam menjalankan siasatan forensik mereka di tempat kejadian tersebut. Dengan itu tiada wujud sebarang “*break in the chain of causation*” sepertimana yang didakwa.

Alasan (e): Kegagalan pihak pendakwaan melakukan analisa DNA di tempat kejadian bagi membandingkannya dengan DNA Perayu.

- [66] Peguambela Perayu menghujahkan bahawa tidak ada analisa atau laporan forensik yang dilakukan terhadap DNA Perayu bagi mengesahkan kewujudan kesan DNA Perayu di rumah si mati atau pada tubuh si mati. Perkara ini telah diakui oleh SP15 semasa pemeriksaan balas bila beliau mengesahkan bahawa DNA profiling bagi Perayu tidak dihantar.
- [67] Di dalam menjawab persoalan yang ditimbulkan ini hakim bicara yang bijaksana di dalam alasan penghakimannya menyatakan seperti berikut:

[115] Mahkamah ini tidak bersetuju dengan hujahan peguambela tertuduh mengenai isu ini kerana keterangan saksi mata iaitu SP1 telah membuktikan tertuduh berada di rumah mangsa semasa kejadian bersama Selvam. Tertuduh juga dilihat oleh SP1 memegang pisau dan menghiris atau memotong mangsa semassa kejadian. Keterangan SP6 juga membuktikan tertuduh berada di rumah mangsa semasa

kejadian dan dilihat memegang parang semasa keluar dari rumah mangsa.

[116] Keterangan SP1 dan SP6 juga telah disokong secara material oleh keterangan SP12 yang dapat mengesahkan tertuduh sebagai lelaki India yang bertanyakan di mana paip air dan telah memaki-hamun Tuhan Hindu semasa berada di kuil yang dijaga oleh SP12. Perbuatan tertuduh yang membasuh tangan, kaki dan pakaian semasa di kuil adalah bagi membersihkan kesan percikan dan tompokan darah semasa kejadian.

[117] Dalam dapatan mahkamah ini, hasil analisis kesan cap jari yang dijalankan oleh SP3 dan siasatan forensik oleh pasukan SP8 adalah baik dan teratur dan menunjukkan tertuduh berada di rumah mangsa semasa kejadian dan terlibat dalam pembunuhan mangsa berdasarkan keterangan SP1 (saksi mata) yang berada di rumah mangsa semasa kejadian. Keterangan SP1 mengenai kehadiran tertuduh di rumah mangsa semasa kejadian juga disokong secara material oleh keterangan SP6.

[118] Justeru hujahan peguambela mengenai isu ini tidak diterima oleh mahkamah ini.

[119] Kami bersetuju dengan dapatan yang dibuat oleh hakim bicara berkaitan isu ini. Seharusnya ditegaskan bahawa DNA hanyalah merupakan suatu keterangan sokongan sahaja. Seperti yang telah dinyatakan, terdapat keterangan yang melimpah ruah mengaitkan Perayu dengan kesalahan ini. Identiti Perayu sebagai orang yang terlibat melakukan pembunuhan ini bukan lagi menjadi suatu persoalan bagi kami. Justeru itu, kami berpandangan bahawa analisa DNA (jika ada sekalipun) hanya mempunyai nilai relevan yang kecil sahaja dan ketiadaannya pula tidak mampu untuk memudaratkan kes pendakwaan.

- [68] Di dalam kes *Yeo Kwee Huat v. Public Prosecutor* [2011] 5 CLJ 630, Mahkamah Rayuan melalui penghakiman yang disampaikan oleh Sulaiman Daud HMR (beliau pada ketika itu) memutuskan seperti berikut:

“[31] Adalah tidak dipertikaikan bahawa kotak kek P13 dan kedua- dua bungkusan plastik asal dadah yang dipersoalkan (P14A dan P14B) telah dihantar untuk pengesanan cap jari tetapi tiada penimbunan cap jari yang positif dikesan pada ekshibit-ekshibit tersebut. Atas alasan ini, peguam terpelajar perayu menghujahkan ketiadaan cap jari pada ekshibit-ekshibit tersebut turut menjejaskan kes pendakwaan. Kami mendapati tiada merit mengenai penghujahan sedemikian. Tujuan untuk menimbulkan cap jari pada sesuatu ekshibit adalah untuk menentukan identiti pesalah atau orang yang pernah mengendalikan ekshibit tersebut. Dalam kes sekarang ini tidak dipertikaikan bahawa semasa ditahan perayu sedang membawa beg P15 yang di dalamnya terdapat kotak kek P13 yang mengandungi dadah yang dipersoalkan. Oleh itu tiada keraguan bahawa dia mempunyai jagaan dan kawalan ke atas beg serta kotak kek dan dadah yang terkandung di dalamnya. Setelah elemen jagaan atau kawalan ini terbukti, maka anggapan di bawah s. 37(d) terpakai bagi menunjukkan milikan atau pengetahuan. Oleh itu kami mendapati ketiadaan kesan cap jari pada ekshibit- ekshibit tersebut tidak langsung menjejaskan kes pendakwaan, lebih-lebih lagi setelah menolak watak “Peter” yang dikatakan oleh perayu orang yang memasukkan kotak kek tersebut ke dalam begnya.”

- [69] Di dalam kes *PP v. Mansor Md Rashid & Anor* [1996] 3 MLJ 233, di m/s 250, Mahkamah Persekutuan melalui penghakiman yang disampaikan oleh Chong Siew Fai CJ (Sabah and Sarawak) memutuskan seperti berikut:

“Where the identity of a culprit is in question or is required to be proved, fingerprint evidence will be of a great significance and immense value. In the present case under appeal, however, the charge alleged trafficking in the form of a 'sale' and there was evidence indicating the identities of the alleged offenders and the sale transaction. Fingerprint evidence on the newspaper wrapping, white plastic and the loytape, therefore, assumed little value or significance.”

Alasan (f): Kegagalan pihak pendakwaan memanggil Prabhu/Pirabu dan majikan Prabhu/Pirabu untuk keterangan telah memprejudiskan Perayu.

[70] Peguambela Perayu menghujahkan bahawa kegagalan memanggil Prabhu/Pirabu dan majikannya untuk memberi keterangan telah memprejudiskan Perayu kerana ia merupakan kegagalan pegawai penyiasat untuk menyiasat kes dengan menyeluruh. Ini adalah kerana walaupun terdapat kesan cap jari Perayu di tempat kejadian, namun terdapat juga kesan cap jari pihak ketiga termasuk Prabhu yang gagal disiasat dengan mendalam oleh pegawai penyiasat. Fakta ini telah disahkan oleh keterangan SP15 sendiri.

[71] Di dalam memutuskan persoalan yang dibangkitkan, ini hakim bicara yang bijaksana di dalam alasan penghakimannya memutuskan seperti berikut:

[111] Mahkamah ini tidak bersetuju dengan hujahan peguambela tertuduh bahawa kesan cap jari pihak-pihak lain tidak dipanggil untuk memberi keterangan termasuk Pirabu. SP15 semasa memberi keterangan telah menyatakan Pirabu telah ditangkap oleh pihak polis pada 10 Jun 2015 [lihat P72] dan rakaman percakapan yang diambil menunjukkan Pirabu mengenali mangsa dan SP1. Siasatan polis menunjukkan Pirabu telah datang ke rumah mangsa dua hari sebelum kejadian untuk memasak, minum dan berhibur. Ini

menyebabkan kesan cap jari Pirabu ditemui di rumah mangsa hasil analisis SP3.

[112] Selain kesan cap jari Pirabu, kesan cap jari tertuduh juga telah ditemui di rumah mangsa hasil analisis oleh SP3. Keterangan SP1 semasa memberi keterangan mengesahkan hanya tertuduh dan Selvam sahaja yang datang ke rumah mangsa semasa kejadian dan telah bergaduh, menghiris atau memotong mangsa menggunakan pisau. Menurut keterangan SP1, Pirabu tidak berada di rumah mangsa semasa kejadian dan tidak terlibat dalam pembunuhan mangsa. Siasatan SP15 menunjukkan Pirabu bekerja sebagai pengawal keselamatan pada hari kejadian dan ini disahkan oleh majikan Pirabu.

[113] Mahkamah ini dapati tertuduh semasa memberi keterangan membela diri juga mengesahkan Pirabu tidak berada di rumah mangsa semasa kejadian. Yang berada di rumah mangsa semasa kejadian ialah tertuduh, Selvam, SP1 dan Najif (kawan Selvam). Dalam dapatan mahkamah ini, siasatan SP15 menunjukkan Pirabu tidak terlibat dan disebabkan itu tiada pendakwaan diambil terhadap Pirabu. Hanya tertuduh dan Selvam sahaja yang dituduh dengan niat bersama membunuh mangsa.

[114] Justeru hujahan peguambela tertuduh mengenai isu ini tidak dapat diterima oleh mahkamah ini.

[72] Sewajarnya ditekankan bahawa bukan lah menjadi kes pembelaan bahawa Pirabu berada di rumah si mati semasa kejadian atau terlibat dalam menghiris atau memotong si mati semasa kejadian. Oleh kerana itu, kegagalan pihak pendakwaan untuk memanggil Pirabu tidak mengundang sebarang inferens bertentangan di bawah seksyen 114(g) Akta Keterangan 1950. Tambahan lagi, penama Pirabu ini bukannya merupakan seorang saksi yang material untuk “*unfold the narrative of the case*”. Sewajarnya diulangi saksi-saksi yang telah

dipanggil oleh pihak pendakwaan sudah mencukupi untuk membuktikan penglibatan Perayu di dalam pembunuhan ini.

[73] Bagi menunjukkan bahawa pihak pendakwaan tidak mempunyai apa - apa niat jahat (*mala fide*) untuk menyembunyikan keterangan Pirabu, penama ini telah ditawarkan kepada pihak pembelaan di akhir kes pendakwaan. (**Nota Prosiding Kandungan 18 RR 2 (9) m/s 962**).

[74] Sehubungan dengan itu, tiada alasan untuk kami tidak bersetuju dengan dapatan ringkas tapi padat yang diberikan oleh hakim bicara yang bijaksana ini. Penghujahan peguambela Perayu tentang isu ini ditolak.

Alasan (g): Terdapat keraguan munasabah yang dibangkitkan oleh pihak pembelaan.

[75] Hakim bicara yang bijaksana telah membuat penilaian maksima di atas kes pembelaan dan mendapati tiada keraguan munasabah yang berjaya ditimbulkan oleh pihak pembelaan terhadap kes pendakwaan. Ini secara terang dizarhikan oleh hakim bicara di dalam alasan penghakimannya sepertimana berikut:

[119] Mahkamah ini telah menimbangkan pembelaan tertuduh dan mendapati tertuduh telah menafikan terlibat dalam pembunuhan mangsa dan menyalahkan pihak yang lain. Semasa saksi-saksi pendakwaan diperiksa balas khususnya SP1, peguambela tertuduh mencadangkan SP1 yang terlibat dalam pembunuhan mangsa tetapi telah dinafikan oleh SP1. Peguambela tertuduh juga mencadangkan kepada SP1 bahawa pihak yang telah bergaduh, menyerang dan menetak mangsa semasa kejadian ialah Selvam dan seorang bernama Rajiv (abang saudara SP1) tetapi telah dinafikan oleh SP1.

[120] Peguambela tertuduh juga mencadangkan kepada SP1 bahawa Rajiv yang bertengkar dengan mangsa kerana terdapat ugutan untuk membunuh SP1 tetapi dinafikan oleh SP1.

Peguambela tertuduh juga mencadangkan kepada SP1 bahawa berlaku perselisihan faham di antara Rajiv dan mangsa tetapi dinafikan oleh SP1. Peguambela tertuduh juga mencadangkan kepada SP1 bahawa tertuduh tidak berada di rumah mangsa pada permulaannya tetapi dinafikan juga oleh SP1. Selanjutnya SP1 menyatakan Rajiv tidak berada di rumah mangsa semasa kejadian dan yang berada di rumah mangsa semasa kejadian hanya tertuduh dan Selvam sahaja.

[121] Mahkamah ini dapati peguambela tertuduh tidak mencadangkan kepada SP1 semasa pemeriksaan balas bahawa tertuduh berada di luar rumah mangsa bercakap telefon dengan kakak tertuduh dan hanya masuk ke dalam rumah mangsa setelah terdengar bunyi. Tiada cadangan juga dibuat oleh peguambela tertuduh kepada SP1 bahawa semasa tertuduh masuk ke dalam rumah mangsa, tertuduh melihat mangsa dan Selvam bergaduh dan nampak Selvam menetak mangsa dengan parang.

[122] Selanjutnya mahkamah ini dapati peguambela tertuduh tidak mencadangkan kepada SP1 semasa pemeriksaan balas bahawa semasa tertuduh melihat Selvam menetak mangsa semasa kejadian, tertuduh telah cuba menghalang Selvam dengan menarik badan Selvam dan berjaya merampas parang tersebut daripada tangan Selvam dan tertuduh menyerahkan parang tersebut kepada kawan Selvam bernama Najif (bukan Rajiv). Mahkamah ini dapati Rajiv dan Najif adalah dua individu yang berbeza yang dibangkitkan oleh tertuduh. Najif yang membawa tertuduh dan Selvam ke rumah mangsa dari Sunway dengan menaiki kereta Iswara kepunyaan Najif mengikut pembelaan tertuduh.

[123] Semasa SP1 diperiksa balas oleh peguambela tertuduh, tiada cadangan dibuat oleh peguambela tertuduh bahawa semasa kejadian parang yang digunakan oleh Selvam telah

diambil oleh SP1 dari tepi televisyen dan diserahkan kepada Najif yang menyerahkan parang tersebut kepada Selvam. Semasa parang tersebut diserahkan kepada Selvam, SP1 tidak diperiksa balas oleh peguambela tertuduh bahawa Najif berkata “tetak dia tetak dia” semasa menyerahkan parang tersebut.

[124] Dalam dapatan mahkamah ini, cadangan peguambela tertuduh kepada saksi-saksi pendakwaan semasa saksi-saksi tersebut diperiksa balas dan semasa tertuduh memberi keterangan membela diri bertujuan menunjukkan tertuduh tidak terlibat membunuh mangsa dan hanya berada di rumah mangsa kerana mengikut Selvam. Sebaliknya mahkamah ini dapati semasa membela diri tertuduh menyatakan Selvam adalah pakcik teman wanita tertuduh dan tertuduh membantu Selvam yang tidak mempunyai pengangkutan untuk ke Sunway dan seterusnya ke rumah mangsa dengan Najif. Ini menunjukkan tertuduh mempunyai hubungan rapat dengan Selvam dan mempunyai tujuan yang sama dengan Selvam untuk pergi ke rumah mangsa.

[125] Mahkamah ini dapati pembelaan tertuduh adalah jauh berbeza dengan keterangan saksi-saksi pendakwaan. Keterangan SP1 (saksi mata) yang berada di rumah mangsa semasa kejadian menunjukkan tertuduh terlibat dalam menghiris atau memotong mangsa dengan menggunakan pisau. SP1 juga melihat tertuduh memegang pisau dan parang semasa keluar dari rumah mangsa. Selanjutnya keterangan SP6 menunjukkan tertuduh memegang parang semasa keluar dari rumah mangsa selepas mangsa dibunuh. Keterangan SP12 pula menunjukkan tertuduh berada di kuil yang dijaga oleh SP12 pada malam kejadian untuk mencari paip air untuk membasuh tangan, kaki dan pakaian yang dipakai oleh tertuduh. Tertuduh juga dicam oleh SP12 sebagai lelaki India yang bertanyakan di

mana paip air dan lelaki India yang telah memaki- hamun Tuhan Hindu semasa di kuil tersebut.

[126] Secara keseluruhannya dan berdasarkan alasan-alasan yang dinyatakan di atas, mahkamah ini dapati pembelaan tertuduh bertujuan menunjukkan tertuduh tidak terlibat sama sekali dalam pembunuhan mangsa dan hanya mengikut Selvam ke rumah mangsa semasa kejadian. Mahkamah ini dapati pembelaan tertuduh sukar dipercayai atau diterima oleh mahkamah ini dan juga gaga! menimbulkan sebarang keraguan munasabah terhadap kes pendakwaan.

[128] Dalam dapatan mahkamah ini, pembelaan tertuduh secara keseluruhannya telah gagal menimbulkan sebarang keraguan yang munasabah terhadap kes pendakwaan.

[131] Setelah membuat penilaian maksima terhadap keseluruhan keterangan yang telah dikemukakan oleh pihak pendakwaan serta pembelaan tertuduh mengikut kehendak s. 182A KTJ, mahkamah ini berpuas hati dan memutuskan pihak pendakwaan telah berjaya membuktikan kesnya melampaui keraguan yang munasabah terhadap tertuduh.

[133] Mahkamah ini dapati pembelaan tertuduh sukar dipercayai atau diterima oleh mahkamah ini dan juga gagal menimbulkan sebarang keraguan yang munasabah terhadap kes pendakwaan.

[76] Di dalam kes *PP v. Ling Tee Huah* [1980] CLJU 212; [1980] 1 LNS 212; [1982] 2 MLJ 324, mahkamah memutuskan seperti berikut:

“The accused's defence was one of denial. A mere denial without other proof to reasonably dislodge the prosecution's evidence is not sufficient”.

- [77] Mahkamah dalam mendengar rayuan ini berpandukan kepada prinsip undang-undang yang mantap di mana mahkamah di peringkat rayuan seharusnya mengambil pendirian untuk tidak mengganggu keputusan yang telah dibuat oleh mahkamah perbicaraan melainkan ternyata keputusan tersebut mempunyai salah arah, tidak menurut undang-undang dan terdapat keterangan yang kuat yang menunjukkan bahawa hakim bicara telah terkhilaf di dalam menilai keterangan yang telah dikemukakan semasa perbicaraan.
- [78] Pada hemat kami tiada apa-apa kekhilafan yang telah dilakukan oleh hakim bicara di dalam membuat penilaiannya yang teliti dan mendalam terhadap kes pembelaan. Dengan itu, isu yang diketengahkan ini ditolak.
- [79] Bagi isu-isu lain yang diketengahkan oleh pihak pembelaan, dengan hormatnya kami tidak berhasrat untuk mengupasnya kerana kami dapati ianya tidak bermerit. Malah pada pandangan kami isu-isu sampingan tersebut tidak akan membawa apa-apa kesan terhadap dapatan yang telah kami buat di atas.

Kesimpulan

- [80] Berkenaan **rayuan terhadap sabitan**, setelah meneliti alasan penghakiman dan mengambil kira hujahan kedua-dua pihak, kami dapati tiada sebarang kecacatan di dalam dapatan hakim bicara berkenaan isu-isu yang dibangkitkan oleh peguambela Perayu khususnya berkenaan dengan penglibatan SP1 dalam jenayah pembunuhan itu.
- [81] Hakim bicara yang bijaksana telah memberi tumpuan sepenuhnya terhadap hujahan ini dan menolak pendirian pihak pembelaan bahawa SP1 merupakan seorang rakan sejenayah kerana pada hemat kami tiada secebis keterangan pun yang menunjukkan penglibatan SP1 dalam pembunuhan ke atas si mati sebelum, semasa, atau selepas

kejadian pembunuhan itu. Justeru itu, kami bersetuju dengan dapatan Hakim Mahkamah Tinggi.

[82] Pada keseluruhannya, kami mendapati sabitan adalah selamat untuk dikekalkan. Rayuan terhadap sabitan adalah ditolak.

[83] Berkenaan dengan **rayuan terhadap hukuman**, Akta Pemansuhan Hukuman Mati Mandatori 2023 (Akta 846) yang berkuat kuasa pada 4/7/2023 memberi kami kuasa budi bicara untuk menjatuhkan hukuman mati atau pemenjaraan bagi tempoh tidak kurang 30 tahun tetapi tidak melebihi 40 tahun dan sekiranya tidak dijatuhkan hukuman mati, hendaklah juga dihukum dengan sebatan tidak kurang 12 kali. Setelah menilai keseluruhan keterangan yang dikemukakan, kami dapati fakta di dalam kes ini membolehkan kami melaksanakan budi bicara tersebut.

[84] Rumusan yang dibuat ini adalah berpaksikan kepada keterangan daripada SP1 sendiri bahawa beliau melihat penglibatan Selvam di dalam pembunuhan si mati. Timbalan Pendakwa Raya yang bijaksana juga mengakui di hadapan kami bahawa motif pembunuhan terletak pada Selvam. Maka dengan menggunapakai prinsip undang-undang yang dihuraikan oleh Mahkamah Rayuan di dalam kes *Alowonle Oluwajuwon Gilbert v. Pendakwa Raya* [2023] CLJU 2391; [2023] 1 LNS 2391, kami sebulat suara memutuskan untuk mengenyahkan hukuman gantung sampai mati terhadap Perayu dan menggantikannya dengan hukuman pemenjaraan selama 35 tahun dari tarikh tangkap (15/7/2017) dan 12 kali sebatan rotan.

Tarikh: 30 JANUARI 2024

(Azmi Ariffin)

Hakim

Mahkamah Rayuan Malaysia

Kaunsel:

Bagi perayu pertama - C Vignesh Kumar & S Rubanyah; M/s Vignesh Kumar & Associates

Bagi pihak responden - How May Ling; Timbalan Pendakwa Raya; Jabatan Peguam Negara, Malaysia

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In Kuching, convicted murderer escapes gallows after Federal Court commutes death sentence

BY DESIREE DAVID ON SEPTEMBER 20, 2023, WEDNESDAY AT 3:02 PM

SARAWAK

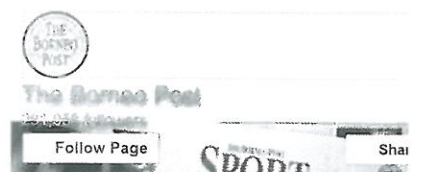
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Tony leaves the courtroom at the end of the Federal Court proceedings.

KUCHING (Sept 20): The Federal Court sitting here today commuted the death sentence of a 45-year-old man for the murder of his friend in Sibul to 30 years in prison.

A three-member panel comprising Justices Tan Sri Datuk Amar Abang Iskandar Abang Hashim, Datuk Rhodzariah Bujang, and Datuk Nordin Hassan also ordered for Tony Rambor to receive 12 strokes of the cane.



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The jail sentence is effective from the date of his arrest on June 28, 2017.

The unanimous decision of the three judges follows an amendment to Section 302 of the Penal Code, where the death sentence ought to be commuted to imprisonment based on the circumstances and facts of the case.

The amendment of Section 302 of the Penal Code provides for a death sentence or imprisonment term of not less than 30 years but not exceeding 40 years, and if not sentenced to death, shall also be punished with not less than 12 strokes of the rotan.

The bench dismissed Tony's appeal against the conviction, as the judgement of the murder case was safe to be upheld.

On Dec 11, 2018, the High Court in Sibü found Tony guilty of murdering his friend in front of an unnumbered house there around 8pm on June 26, 2017.

Based on the facts of the case, Tony, the deceased, and two other men were drinking alcoholic beverages and during their drinking session, which extended to the early evening, they also took turns buying drinks from a nearby shop.

Two others joined the drinking session but they left in the afternoon.

At around 8pm, a misunderstanding occurred between Tony and the deceased that led to the former bludgeoning the deceased with a piece of wood and throwing the body into a nearby drain before going home.

Members of the public discovered the body the next morning and the police found a wood chip with bloodstains at the scene.

The case, which saw 12 witnesses throughout the trial, was prosecuted by DPP Datin Asmah Musa, while Tony was represented by appointed counsels Christopher Bada and Nur Azureen Zainudin.



Abang Iskandar Abang Hashim

Christopher Bada

Datin Asmah Musa

federal court

Nordin Hassan

Nur Azureen Zainudin

Rhodzariah Bujang

Sibu High Court

Tony Rambor

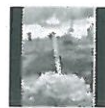


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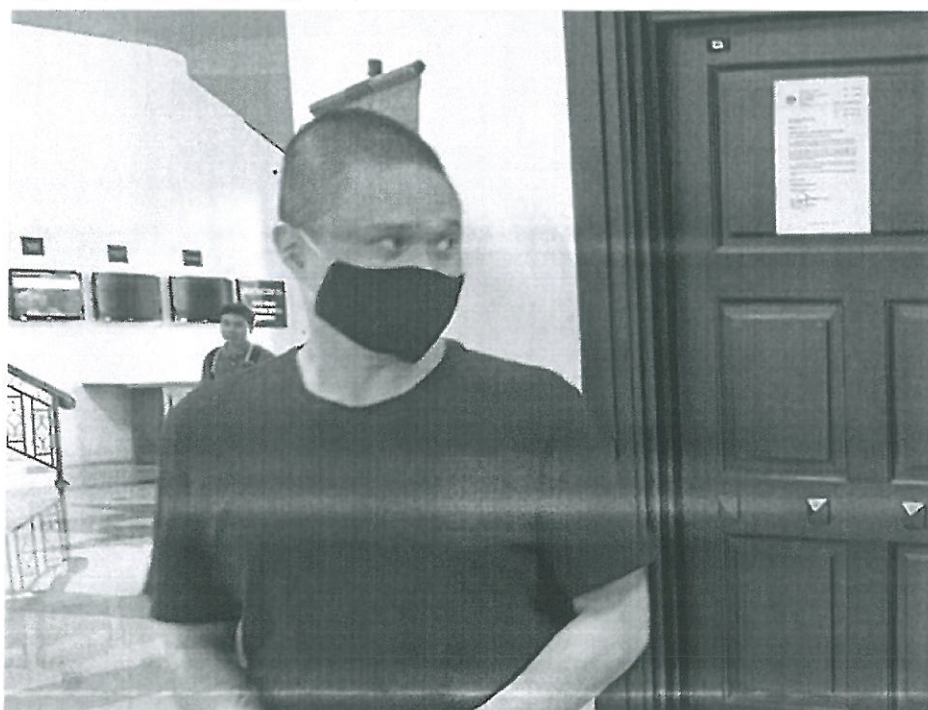
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Man escapes gallows, gets 33 years, 12 strokes for killing girlfriend in Kuching in 2017

BY DESIREE DAVID ON SEPTEMBER 20, 2023, WEDNESDAY AT 5:23 PM

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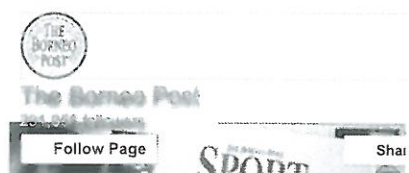


Salman being escorted out of the courtroom.

KUCHING (Sept 20): A man was spared the gallows by the Federal Court here today for murdering his girlfriend in 2017.

Salman Kassim, 31, was instead sentenced to 33 years in jail and ordered to be whipped 12 times.

The three-member bench comprising Justices Tan Sri Datuk Amar Abang Iskandar Abang Hashim, Dato Rhodzariah Bujang and Dato Nordin Hassan were unanimous



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in agreeing with Salman's counsel CM Sundram that the death sentence should be commuted to imprisonment based on the facts of the case, mitigation and circumstances.

The unanimous decision follows an amendment to Section 302 of the Penal Code, where the death sentence ought to be commuted to imprisonment based on the circumstances and facts of the case.

The amendment of Section 302 of the Penal Code provides for a death sentence or imprisonment term of not less than 30 years but not exceeding 40 years, and if not sentenced to death, shall also be punished with not less than 12 strokes of the cane.

Salman's jail sentence is to take effect from the date of arrest on March 24, 2017.

In delivering the court's decision, the bench also dismissed Salman's appeal against his murder conviction, ruling it to be safe.

On June 10, 2020, the High Court sentenced Salman to death for murdering his girlfriend in a room of a building at Liang Kee Commercial Centre, Mile 4 Jalan Penrissen here between 1.30am and 3.30am on March 24, 2017.

Based on the facts of the case, Salman was spending the night with the deceased in her rented room after arriving in Kuching from Kuala Lumpur where he worked.

He had a long-standing relationship with the deceased and had intended to marry her, and had also been giving her substantial monetary allowances every month.

Salman suspected his girlfriend of having a relationship with another man after coming across a photo on social media showing her in a car with another man.

That night, his suspicion grew stronger as his girlfriend was continuously preoccupied with incoming calls and messages on her cell phone to the extent that she ignored him.

It was her refusal to have sexual intercourse with him that night that sent him into a rage, and he grabbed the nearest thing he could find, which happened to be a knife, and attacked her.

The deceased had multiple injuries including a stab wound to the chest and three stab wounds to the neck, one of which severed her left carotid artery and caused her death.

When Salman realised what he had done, he slashed his wrist and stabbed himself in the abdomen and neck in an apparent attempt to commit suicide, before running out of the room to a nearby shop to ask for help and to call the police.



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Police later arrested Salman after sending him to the hospital for treatment and recovering the knife from the room.

During his trial, Salman relied upon the defence of 'grave and sudden provocation', saying he was so consumed with anger over the deceased seeing another man that he lost all control of himself and inflicted the injuries on her but without any intention to cause death.

The case, which was prosecuted by DPP Mangaiarkarasi Krishnan, saw five witnesses testifying during the trial.

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